BRIAN McINTYRE
COCHISE COUNTY ATTORNEY
By: CHRISTINE J. ROBERTS
Civil Deputy County Attorney
State Bar No. 033718
P.O. Drawer CA
Bisbee, AZ 85603
(520) 432-8700
CVAttymeo@cochise.az.gov

Attorney for Defendants
Cochise County, Cochise County Board of Supervisors & Cochise County Clerk, Arlethe Rios

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

TERRI JO NEFF, a single woman, Plaintiff, v. COCHISE COUNTY; COCHISE COUNTY BOARD OF SUPERVISORS; ARLETHE RIOS, COCHISE COUNTY CLERK, Defendants.	**Case No. CV201900323** **DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S STATUTORY SPECIAL ACTION COMPLAINT** **Assigned to Hon. David Thorn Div. III**

Defendants Cochise County, Cochise County Board of Supervisors, and Arlethe Rios, Cochise County Clerk (collectively, "Defendants"), through undersigned counsel, hereby moves this Court for dismissal of Plaintiff's Statutory Special Action Complaint ("Complaint") with prejudice. As more fully set forth in the following memorandum of points and authorities, Plaintiff's only basis for its Complaint is that Cochise County

("County") would not disclose a copy of an engagement letter for legal services provided to the County - a confidential document that is protected by attorney-client privilege - in response to her public records request. A.R.S § 12-2234 makes attorney-client privileged communications confidential. Arizona Public Records Law, A.R.S. §§ 39-101, *et seq.*, specifically, does not require production of a document that has been deemed confidential by statute, rule or a recognized privilege and therefore, the County is not required, under law, to produce the engagement letter. Consequently, the Complaint fails to state a claim upon which relief can be granted under Ariz. Rules of Civ. Proc., Rule 12(b)(6). For this reason, Defendants request dismissal with prejudice of Plaintiff's Complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

On February 14, 2019, David Welch filed a civil action against the Board of Supervisors, contesting the appointment of Pat Call as Justice of the Peace for Precinct 5. The matter is captioned *David Welch v. Cochise County Board of Supervisors, et al.*, CV201900060 ("Welch Lawsuit"). (Complaint, ¶ 6.) Because the County Attorney's Office ("CAO") had a conflict of interest, on February 22, 2019, the CAO arranged for Jim Jellison of Jellison Law Offices, PLLC to represent the County in that lawsuit. (Complaint, ¶ 7.)

Plaintiff Terri Jo Neff ("Plaintiff") is a freelance journalist, who resides in Cochise County, Arizona. (Complaint, ¶ 1). On April 12, 2019, Plaintiff filed a public

records request for the engagement letter between attorney Jim Jellison and the County in the Welch Lawsuit and for any related legal billing invoices and payments. (Complaint, ¶ 10, Exhibit A.) On April 17, 2019, the undersigned counsel responded to Plaintiff's public records request, by e-mail, informing her that the County would not release the requested records, at this time, because they are attorney-client privileged documents and the litigation on the Welch Lawsuit was active and ongoing. (Motion to Dismiss, Exhibit A, attached hereto.)[1] The undersigned counsel further explained that once the litigation was concluded, Plaintiff could have redacted copies of the legal invoices showing the general title of the matter, dates the services were performed, hours, rates and amounts paid; however, the attorney-client privileged engagement letter was not subject to disclosure. (*Id.*)

In response to the County's refusal e-mail, later that day, Plaintiff requested, by e-mail, the legal authority upon which the County had based its refusal to produce the requested records. (Complaint, ¶ 13.) On the same day, the undersigned counsel responded to Plaintiff with a detailed explanation, including case law and statutory references, of the County's basis for refusing to release the requested records. (Complaint, ¶ 14; Motion to Dismiss, Exhibit A).

---

[1] In her Complaint, Plaintiff references only part of the County's response in the April 17, 2019 e-mail exchange that is incomplete and can be taken out of context. Accordingly, Defendants have attached a full copy of the County's April 17, 2019 e-mail response to Plaintiff, with accompanying attachments. Any partially proffered information or partial document can be supplemented with information from the whole document that should be seen in its entirety to add context to the reader's understanding of the e-mail exchange.

On June 2, 2019, Plaintiff sent another e-mail request to Arlethe Rios, Clerk of the Cochise County Board of Supervisors for *only* the engagement letter. (Complaint, ¶ 15.) On June 2, 2019, on behalf of Ms. Rios, the undersigned counsel responded to Plaintiff's e-mail, again explaining that the engagement letter was a privileged (attorney-client) and confidential document, (Complaint, ¶ 16.) Thereafter, on July 30, 2019, Plaintiff filed this statutory special action Complaint seeking to have this Court compel disclosure of the engagement letter.

II. ARIZONA PUBLIC RECORDS LAW EXEMPTS THE DISCLOSURE OF RECORDS MADE CONFIDENTIAL BY STATUTE

Arizona Rules of Civ. Proc., Rule 12(b)(6) provides that a defendant may file a motion to dismiss if the Plaintiff fails to state a claim upon which relief can be granted. Here, Plaintiff has failed to plead facts sufficient to state a claim for wrongful refusal to disclose the engagement letter because the County's refusal was not wrongful under Arizona law. Consequently, this Court should dismiss Plaintiff's Complaint.

It is true that Arizona's Public Records Law provides a broad right of inspection to the public. *Schoenweiss v. Hamner*, 223 Ariz. 169, 172, 221 P.3d 48, 54-55 (Div. 1 2009). However, "[i]t is settled law in Arizona that '[d]espite the unlimited disclosure expressed by the wording of § 39-121, the availability of records for public inspection is not without qualification.' *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245. ***Public records are not available for inspection when they are made confidential by statute***. *Id.*; ***Phoenix*** *Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 348-49, ¶¶ 18-19, 35 P.3d 105, 109-10 (App.2001)." *Schoeneweis v. Hamner*, 223 Ariz. 169, 173, 221 P.3d 48, 52

(Div. 1 2009) (emphasis added). The custodian of public records **must** deny inspection when the record is made confidential by statute. *Berry v. State*, 145 Ariz. 12, 13-14, 699 P.2d 387, 388-89 (Div. 1 1985) (emphasis added).

Attorney-client privilege has been viewed as central to the effective delivery of legal services. *Samaritan Foundation v. Goodfarb*, 176 Ariz. 497, 862 P.2d 870 (Sup. Ct. 1993), *superseded by statute on other grounds*. The purpose of the privilege is to protect advice given and/or information exchanged during the course of the attorney-client relationship and to encourage candor by the client so that the lawyer's advice will be based on reliable information. *Ulibarri v. Superior Court in and for County of Coconino*, 184 Ariz. 382, 384-385, 909 P.2d 449, 451-52 (Div. 1 1995), *corrected*, (Aug. 22, 1995). Because the attorney-client relationship and the attorney-client privilege is so important to the delivery of legal services, the Arizona Legislature codified and deemed attorney-client communications to be privileged and confidential. *See* A.R.S § 12-2234. Specifically, in relevant part, A.R.S. § 12-2234, subsection B provides:

> "[A]ny communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:
>
> 1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.
>
> 2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or the employee, agent or member."

A.R.S. § 12-2234 (B). Subsection 6.4.1 of the Public Records chapter of the Arizona Attorney General's manual specifically notes that there are many statutes precluding certain kinds of documents from disclosure as public records. It lists these statutes in Appendix 6.1 to the Manual. Citing A.R.S. § 12-2234, "privileged communications, attorney and client", are of course listed in Appendix 6.1. *A.G. Agency Manual*, pp. 6-17.

Here, the engagement letter between Jim Jellison and the County to provide legal services for the County on the Welch Lawsuit is a communication that is protected under A.R.S. § 12-2234 because it is a communication that is for the purpose of securing and providing legal advice and representation from attorney Jellison to the County. Consequently, the engagement letter is a privileged and confidential document that is not subject to disclosure in response to Plaintiff's public records request. Because the engagement letter is not subject to disclosure under Arizona public records law, Plaintiff fails to state facts sufficient to state a claim. Consequently, under Ariz. Rule of Civ. Proc., Rule 12 (b)(6), this Court should dismiss Plaintiff's Complaint with prejudice.

Citing two Arizona cases, the Plaintiff claims that it is "settled Arizona law" that "the fact the client has retained an attorney, the identity of the client, the dates and numbers of visits to the attorneys are outside the scope and purpose of the attorney-client privilege." (Complaint, ¶ 17). Neither case stands for any of these propositions. [2]

---

[2] *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 64, 13 P.3d 1169 (Sup. Ct. 2000) is a case about waiver and implied waiver of attorney-client privilege in the context of an insurance bad-faith lawsuit against an insurance company for rejection of

Moreover, none of these propositions are relevant to the present case, which concerns the disclosure of a written communication between attorney and client. In fact, no Arizona case or other legal authority even remotely supports the proposition that an engagement letter is not a privileged attorney-client communication—for the obvious reason that it is indeed privileged.

Finally, citing *KPNX-TV v. Superior Court In & For Cty. of Yuma*, 183 Ariz. 589, 594, 905 P.2d 598, 603 (Div. 1 1995), the Plaintiff alleges that "[i]n the event that Cochise County and/or the Cochise County Clerk or County attorney believed that portions of the contract [engagement letter] were not subject to disclosure under Arizona public records law, Arizona law requires that they disclose the portions of the contract that are subject to disclosure, and seek an *in camera* inspection concerning the portions that they believe are privileged." Again, the Plaintiff is simply making it up. Neither that case, nor any other, makes any such requirement or even suggests it. Courts have encouraged *in camera* review "when competing interests may limit disclosure." *Lunney v. State*, 244 Ariz. 170, 179, 418 P.3d 943, 952 (Div. 1 2017). *Lunney,* for example, involved a weighing of DPS officers' personal privacy interests in their personal cell phones against the public interest in knowing whether they used them for public rather than private purposes. Likewise, in another case encouraging *in camera* review, *Griffis v. Pinal County,* 215 Ariz. 1, 6, 156 P.3d 418 (Sup. Ct. 2007), involved the weighing of

---

uninsured/underinsured motorist claims. *Granger v. Wisner*, 134 Ariz. 377, 379, 656 P.2d 1238 (Sup. Ct. 1982) is a case about whether attorney-client privilege applied to a consulting expert retained by plaintiff, who was later called by defendant to testify in a medical malpractice lawsuit.

the same competing interests where a county employee used his government computer to send private emails.

But here, there was and is no weighing to be done. The Legislature has made attorney-client communications non-disclosable. A.R.S. § 12-2234. The letter of engagement in this case is an attorney-client communication. Period.

Consequently, Plaintiff's claim must be dismissed with prejudice.

III. CONCLUSION

Defendants respectfully request that Plaintiff's Complaint be dismissed with prejudice because Plaintiff fails to state a claim upon which relief can be granted.

RESPECTFULLY SUBMITTED this 26th day of August, 2019.

COCHISE COUNTY ATTORNEY

By: _____
CHRISTINE J. ROBERTS
Civil Deputy County Attorney

Copy of the foregoing mailed
this 26th day of August, 2019, to:

Michael J. Bloom, Esq.
Michael J. Bloom, P.C.
100 North Stone Avenue, Suite 701
Tucson, AZ 85701
Attorney for Plaintiff

EXHIBIT

A

Townsend, Debora

From:	Roberts, Christine
Sent:	Wednesday, April 17, 2019 3:05 PM
To:	cjw_media@yahoo.com
Cc:	Hanson, Britt W; Townsend, Debora; McIntyre, Brian M; Gilligan, Edward T
Subject:	RE: Form submission from: Public Records Inspection and Copy Request Form
Attachments:	Los Angeles County Bd of Supervisors v Superior Court.pdf; County of Los Angeles Bd of Supervisors v Superior Court.pdf; State ex rel Anderson v Vermilion.pdf; State ex rel Dawson v Bloom-Carroll Local School Dist.pdf

Good afternoon, Terri Jo,

The custodian of public records must deny inspection when the record is made confidential by statute. *Berry v. State*, 145 Ariz. 12, 13-14, 699 P.2d 387, 388-89 (App. 1985). A.R.S. § 12-2234 makes attorney-client privileged communications confidential. Therefore, they are exempted from disclosure under public records law.

Although, there are no recorded cases dealing with this specific issue in Arizona case law, there is persuasive authority from neighboring states. In the lack of state specific case law, we look to other states for persuasive authority. Specifically, the California Supreme Court ruled that attorney client privilege protects the confidentiality of legal invoices for work on active and pending legal matters, including the amount of aggregate fees. On remand, the California appellate court ruled that redacted portions of legal bills or invoices (because of attorney-client privileged information on the bill or invoice) other than fee totals, of law firm invoices in concluded litigation were not subject to disclosure under public record law. *See* the attached cases.

Additionally, the Ohio Supreme Court has also ruled that legal bills are privileged. *State ex rel. Dawson v. Bloom Carroll Local School Dist.*, (2011), 131 Ohio St.3d 10, 2011 Ohio 6009, 959 N.E.2d 524. Further, any document establishing an attorney-client relationship is privileged. *Id.* *See* attached case. Here, any agreement between Attorney Jellison and Cochise County for legal services is a document that establishes an attorney-client relationship and is privileged. Therefore, is exempt from disclosure.

In *State ex rel. Anderson v. City of Vermilion*, Slip Op. No.2012-Ohio-5320, the Ohio Supreme Court found that the information subject to disclosure from legal bills or invoices is limited to: (1) the general title of the matter being handled; (2) the dates the services were performed; and (3) the hours, rate, and money charged for the services. *See* attached case.

In sum, all of the information that you requested is attorney-client privileged. Currently, the litigation is ongoing and active. Upon conclusion of the litigation, you may receive copies of the legal bills invoices, subject to redaction of the attorney-client privileged information. Specifically, the general title of the matter, dates the services were performed, hours, rates and money charged for the services. You may not receive a copy of the agreement to provide legal services.

Best regards,

Christine J. Roberts, Esq., M.B.A.
Civil Deputy County Attorney
Cochise County Attorney's Office
Civil Division
100 Higgins Hill
P.O. Drawer CA
Bisbee, Arizona 85603
(520) 432-8754 Direct
(520) 432-8700 Main
(520) 432-8778 Fax
CRoberts@cochise.az.gov

Public Programs . . . Personal Service
www.cochise.az.gov

From: Terri Jo Neff <cjw_media@yahoo.com>
Sent: Wednesday, April 17, 2019 2:10 PM
To: Roberts, Christine <CRoberts@cochise.az.gov>
Cc: Hanson, Britt W <BHanson@cochise.az.gov>; Townsend, Debora <DTownsend@cochise.az.gov>; McIntyre, Brian M <BMcIntyre@cochise.az.gov>; Gilligan, Edward T <EGilligan@cochise.az.gov>
Subject: RE: Form submission from: Public Records Inspection and Copy Request Form

Good afternoon Christine,

1) Can you please provide the legal authority under which the County contends the contract for professional legal services is not subject to disclosure under Arizona's public records law?

2) Can you please provide the legal authority under which REDACTED copies of received invoices/bills for legal services are not subject to disclosure under Arizona's public records law until after litigation is complete?

3) You didn't specifically address my 3rd request related to record(s) of payment. Assuming the County contends those records are also not subject to disclosure at this time I'm asking for the legal authority under which the County takes that position.

Respectfully,
Terri Jo

Terri Jo Neff
CJW Media
520-508-3660

On Wed, Apr 17, 2019 at 1:43 PM, Roberts, Christine

<CRoberts@cochise.az.gov> wrote:

Dear Ms. Neff,

The documents that you have requested are attorney-client privileged and cannot be released at this time because there is ongoing, active litigation. Once the litigation has concluded, you may request copies of the legal bills or invoices. Any attorney-client privileged information will be redacted from the legal bills or invoices. However, any agreement between attorney Jim Jellison and Cochise County to provide legal services is not subject to disclosure.

Your request is now CLOSED.

Best regards,

Christine J. Roberts, Esq., M.B.A.

Civil Deputy County Attorney

Cochise County Attorney's Office

Civil Division

100 Higgins Hill

P.O. Drawer CA

Bisbee, Arizona 85603

(520) 432-8754 Direct

(520) 432-8700 Main

(520) 432-8778 Fax

CRoberts@cochise.az.gov

Public Programs . . . Personal Service

www.cochise.az.gov

From: Terri Jo Neff <cjw_media@yahoo.com>
Sent: Friday, April 12, 2019 2:46 PM
To: Townsend, Debora <DTownsend@cochise.az.gov>
Subject: Form submission from: Public Records Inspection and Copy Request Form

Submitted on Friday, April 12, 2019 - 2:46pm

Submitted by user:

Submitted values are:

Date Submitted: 4/12/2019

Name of Requesting Party: Terri Jo Neff

Full Address (to include City, State, and Zip): CJW Media 1081 N Tequila Trail Benson AZ 85602

Telephone number: 5205083660

Email Address: cjw_media@yahoo.com

Indicate with specificity the record(s) you wish to have copied or reproduced. Provide date(s) if possible.

I am requesting to VIEW any contract or agreement related to legal services provided to Cochise County by James "Jim" Jellison or Jellison Law related to litigation about the appointment of Pat Call to justice of the peace.

I am requesting to VIEW any invoice or other such payment demand submitted by Mr. Jellison or his law firm related to the Pat Call litigation, whether such demand has been paid or not.

I am requesting to VIEW any record that will show what funds have been paid to Mr. Jellison or his law firm as of April 12. This could include copy of check or ACH payment order, or simply an accounting line item showing the payments.

Thanks!

Non-Commercial/Commercial Purpose Will not be used for commercial purpose.

Give brief explanation

The specific information which will be utilized from the record(s) requested is:

Which will be used for sale or resale to (Identify Market and Price)

Describe document or material and price:

Which will be used for solicitation to (Identify Market for What and Price)

Which will be used for soliciting a business or commercial relationship. Describe and give price or value:

KeyCite Yellow Flag - Negative Treatment
Distinguished by City of San Diego v. Superior Court, Cal.App. 4 Dist., December 19, 2018

2 Cal.5th 282
Supreme Court of California.

LOS ANGELES COUNTY BOARD OF SUPERVISORS et al., Petitioners,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
ACLU of Southern California et al., Real Parties in Interest.

S226645
Filed 12/29/2016

Synopsis

Background: After county produced copies of records from cases that were no longer pending, with alleged attorney-client privileged and work-product information redacted, pursuant to request submitted by civil liberties organization under **Public Records Act** (PRA), seeking **invoices** specifying amounts that county had been **billed** by any law firm in connection with lawsuits brought by inmates involving alleged jail violence, organization filed petition for writ of mandate, seeking to compel county to disclose records for all lawsuits, not just those that were no longer pending. The Superior Court, Los Angeles County, No. BS145753, Luis A. Lavin, J., granted petition insofar as it pertained to **billing** records. County filed petition for writ of mandate, challenging trial court's ruling. The Court of Appeal granted county's petition. Civil liberties organization petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Cuéllar, J., held that:

[1] attorney-client privilege does not categorically shield everything in a **billing invoice** from PRA **disclosure**;

[2] attorney-client privilege protects the confidentiality of **invoices** for work in pending and active **legal** matters; and

[3] attorney-client privilege may not encompass attorney fee totals in **legal** matters that concluded long ago.

Reversed and remanded.

Opinion, 185 Cal.Rptr.3d 842, superseded.

Werdegar, J., filed dissenting opinion, in which Cantil-Sakauye, C.J., and Corrigan, J., joined.

West Headnotes (15)

[1] **Records**
In general;freedom of information laws in general

Public Records Act (PRA) was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies. Cal. Gov't Code § 6250 et seq.

1 Cases that cite this headnote

[2] **Records**
Evidence and burden of proof

In determining the propriety of an agency's reliance on the **Public Records Act's (PRA)** catchall provision to withhold **public records**, the burden of proof is on the agency "to demonstrate a clear overbalance" in favor of nondisclosure. Cal. Gov't Code § 6255(a).

1 Cases that cite this headnote

[3] **Records**
In general;request and compliance

The fact that parts of a requested document fall within the terms of a **Public Records Act (PRA)** exemption does not justify withholding the entire document. Cal. Gov't Code §§ 6253(a), 6254, 6255.

Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**

Purpose of privilege

Fundamental purpose of attorney-client privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and frank discussion of the facts and tactics surrounding individual **legal** matters. Cal. Evid. Code §§ 950, 954.

1 Cases that cite this headnote

[5] **Statutes**

Purpose and intent

In all questions of statutory interpretation, Supreme Court's foremost task is to give effect to the Legislature's purpose.

2 Cases that cite this headnote

[6] **Statutes**

Context

In construing a statute, courts analyze the statute's text in its relevant context, as text so read tends to be the clearest, most cogent indicator of a specific provision's purpose in the larger statutory scheme.

4 Cases that cite this headnote

[7] **Statutes**

Construction based on multiple factors

In construing a statute, courts interpret relevant terms in light of their ordinary meaning, while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose.

7 Cases that cite this headnote

[8] **Records**

Internal memoranda or letters;executive privilege

Attorney-client privilege does not categorically shield everything in a public entity's attorney's **billing invoice** from **Public Records Act (PRA) disclosure**. Cal. Evid. Code §§ 952, 954; Cal. Gov't Code § 6254(k).

Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**

Professional Character of Employment or Transaction

The attorney-client privilege does not apply to every single communication transmitted confidentially between lawyer and client; rather, the heartland of the privilege protects those communications that bear some relationship to the attorney's provision of **legal** consultation. Cal. Evid. Code § 952.

7 Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**

Client information;retainer and authority

The extent of an organization's resistance to public **disclosure** of its **legal bills** does not dictate the scope of the attorney-client privilege. Cal. Evid. Code §§ 952, 954.

1 Cases that cite this headnote

[11] **Privileged Communications and Confidentiality**

Communications from client to attorney and from attorney to client

The fact that the information communicated by an attorney to his or her client may have some ancillary bearing on the attorney's relationship to a client does not end the inquiry into whether the attorney-client privilege applies, nor does the fact that an attorney would prefer to keep the information confidential. Cal. Evid. Code §§ 952, 954.

7 Cases that cite this headnote

[12] **Privileged Communications and Confidentiality**

⇐ Client information;retainer and authority

The attorney-client privilege protects the confidentiality of **billing** information in an attorney's **invoices** to a client if the information is conveyed for the purpose of **legal** representation, or if the information comes close enough to the heartland of the attorney-client privilege to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role. Cal. Evid. Code §§ 952, 954; Cal. Bus. & Prof. Code § 6149.

9 Cases that cite this headnote

[13] **Privileged Communications and Confidentiality**

⇐ Client information;retainer and authority

When a **legal** matter remains pending and active, the attorney-client privilege encompasses everything in an attorney's **invoice** to a client, including the amount of aggregate fees. Cal. Evid. Code §§ 952, 954; Cal. Bus. & Prof. Code § 6149.

7 Cases that cite this headnote

[14] **Privileged Communications and Confidentiality**

⇐ Client information;retainer and authority

The attorney-client privilege may not encompass attorney fee totals in **legal** matters that concluded long ago, because a cumulative fee total for a long-completed matter does not always reveal the substance of **legal** consultation. Cal. Evid. Code §§ 952, 954; Cal. Bus. & Prof. Code § 6149.

Cases that cite this headnote

[15] **Privileged Communications and Confidentiality**

⇐ Constitutional and statutory provisions

The Evidence Code was meant to incorporate prior law on the attorney-client privilege. Cal. Evid. Code § 952.

*See*2 Witkin, Cal. Evidence (5th ed. 2012) Witnesses, § 100 et seq.

Cases that cite this headnote

****774** *****109** Ct.App. 2/3 B257230, Los Angeles County Super. Ct. No. BS145753

Attorneys and Law Firms

John F. Kratli, Mark J. Saladino and Mary C. Wickham, County Counsel, Roger H. Granbo, Assistant County Counsel, Jonathan McCaverty, Deputy County Counsel; Greines, Martin, Stein & Richland, Timothy T. Coates, Los Angeles, and Barbara W. Ravitz for Petitioners.

Horvitz & Levy, Lisa Perrochet, Encino, Steven S. Fleischman and Jean M. Doherty, Encino, for Association of Southern California Defense Counsel as Amicus Curiae on behalf of Petitioners.

Jennifer B. Henning for California State Association of Counties and League of California Cities as Amici Curiae on behalf of Petitioners.

****775** Keith J. Bray, Long Beach; Dannis Woliver Kelley, Sue Ann Salmon Evans, Long Beach, and William B. Tunick, Sacramento, for Education **Legal** Alliance of the California School Boards Association as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Peter J. Eliasberg, Los Angeles; Davis Wright Tremaine, Jennifer L. Brockett, Nicolas A. Jampol, Los Angeles,Rochelle L. Wilcox, Colin D. Wells, San Francisco, and Diana Palacios, Los Angeles, for Real Parties in Interest.

Reuben Raucher & Blum and Stephen L. Raucher, Los Angeles, for Beverly Hills Bar Association as Amicus Curiae on behalf of Real Parties in Interest.

Tom Myers and Arti Bhimani for AIDS Healthcare Foundation as Amicus Curiae on behalf of Real Parties in Interest.

Ram, Olson, Cereghino & Kopczynski and Karl Olson, San Francisco, for Los Angeles Times Communications LLC, McClatchy Newspapers, Inc., Gannett, First Amendment Coalition, California Broadcasters Association and California Newspapers Publishers Association as Amici Curiae on behalf of Real Parties in Interest.

Arthur S. Pugsley, Melissa Kelly; Joshua R. Purtle and Jaclyn H. Prange, San Francisco, for Los Angeles Waterkeeper and Natural Resources Defense Council as Amici Curiae on behalf of Real Parties in Interest.

Law Office of Chad D. Morgan and Chad D. Morgan, Corona, for Leane Lee, Nevada City, and Coalition of Anaheim Taxpayers for Economic Responsibility as Amici Curiae on behalf of Real Parties in Interest.

Opinion

Cuéllar, J.

***288** This case implicates both the public's interest in transparency and a public agency's interest in confidential communications with its **legal** counsel. The specific question we must resolve is whether **invoices** for work on currently pending litigation sent to the County of Los Angeles by an outside law firm are within the scope of the attorney-client privilege, and therefore exempt from **disclosure** under the California **Public Records Act** (PRA; Gov. Code, § 6250 et seq.). What we hold is that the attorney-client privilege does not categorically shield everything in a **billing invoice** from PRA **disclosure**. But **invoices** for work in pending and active **legal** matters are so closely related to attorney-client communications that they implicate the heartland of the privilege. The privilege therefore protects the confidentiality *****110** of **invoices** for work in pending and active **legal** matters.

I. BACKGROUND

On July 1, 2013, following several publicized inquiries into allegations of excessive force against inmates housed in the Los Angeles County jail system, the ACLU of Southern California and Eric Preven (collectively, the ACLU) submitted a PRA request to the Los Angeles County Board of Supervisors and the Office of the Los Angeles County Counsel (collectively, the County). The request sought "**invoices**" specifying the amounts that the County had been **billed** by any law firm in connection with nine different lawsuits alleging excessive force against jail inmates.

In a letter dated July 26, 2013, the County agreed to produce copies of the requested **invoices** related to three such lawsuits that were no longer pending, with attorney-client privileged and work product information redacted. The ***289** County declined to provide **invoices** for the remaining six lawsuits, which were still pending. According to the County, "the detailed description, timing, and amount of attorney work performed, which communicates to the client and discloses attorney strategy, tactics, thought processes and analysis" were privileged under the Evidence Code and therefore exempt from **disclosure** under Government Code section 6254, subdivision (k) (all undesignated cites hereafter are to the Government Code). The requested **invoices**, the County continued, were also exempt under the PRA's catchall provision, section 6255, subdivision (a), "because the public interest served by not disclosing the records at this time clearly outweighs the public interest served by **disclosure** of the records."

On October 31, 2013, the ACLU filed a petition for writ of mandate in the superior court, seeking to compel the County to "comply with the [PRA]" and disclose the requested records for all nine lawsuits. The ACLU framed its request for the **invoices** as follows: ****776** "Current and former jail inmates have brought numerous lawsuits against the County and others for alleged excessive force. The County has retained a number of law firms to defend against these suits. It is believed that the selected law firms may have engaged in 'scorched earth' litigation tactics and dragged out cases even when a settlement was in the best interest of the County or when a settlement was likely. Given the issues raised by the allegations in these complaints and the use of taxpayer dollars to pay for the alleged use of scorched earth litigation tactics, the public has a right and interest in ensuring the transparent and efficient use of taxpayer money." Defending such lawsuits, the plaintiffs estimated, could cost tens of millions of dollars. After a hearing on June 5, 2014, the court granted the ACLU's petition. The court held that the County had failed to show the **invoices** were attorney-

client privileged communications. As a result, the court ordered the County to release "the **billing** statements for the nine lawsuits identified in the July 1, 2013 [ ]PRA request." But "[t]o the extent these documents reflect an attorney's **legal** opinion or advice, or reveal an attorney's mental impressions or theories of the case," the court held that "such limited information may be redacted."

The County then filed its own petition for writ of mandate in the Court of Appeal, which granted the County's petition and vacated the superior court's order. The Court of Appeal found that "the **invoices** are confidential communications within the meaning of Evidence Code section 952," and therefore "are exempt from **disclosure** under Government Code section 6254, subdivision (k)." Relying on our decision in ***111** *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736 (*Costco*), the appellate court concluded that "the proper focus in the privilege inquiry is not whether the communication contains an attorney's opinion or advice, but whether the relationship is one of attorney-client and whether the ***290** communication was confidentially transmitted in the course of that relationship." And " 'because the privilege protects a *transmission* irrespective of its content,' " the Court of Appeal held that "the **invoices**"—which "constituted information transmitted by the law firms to the County in the course of the representation" and in confidence—were confidential communications within the meaning of Evidence Code section 952. Given this conclusion, the Court of Appeal did not reach the parties' contentions regarding application of the PRA's catchall provision or Business and Professions Code sections 6148 and 6149. We then granted review.

II. DISCUSSION

The primary question raised in this case is whether **invoices** for **legal** services transmitted to a government agency by outside counsel are categorically protected by the attorney-client privilege and therefore exempt from **disclosure** under the PRA, and if not, whether any of the information sought by the ACLU is nonetheless covered by the privilege.

A. Statutory Scheme

1. PRA

[1] The PRA and the California Constitution provide the public with a broad right of access to government information. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 164, 158 Cal.Rptr.3d 639, 302 P.3d 1026.) The PRA, enacted in 1968, grants access to **public records** held by state and local agencies. (§ 6250 et seq.) Modeled after the federal Freedom of Information Act (5 U.S.C. § 552 et seq.), the PRA was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies. (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425, 121 Cal.Rptr.2d 844, 49 P.3d 194.) Such "access to information concerning the conduct of the people's business," the Legislature declared, "is a fundamental and necessary right of every person in this state." (§ 6250.) Consistent with the Legislature's purpose, the PRA broadly defines "**public records**" to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (§ 6252, subd. (e).)

****777** As the result of a 2004 initiative, Proposition 59, voters enshrined the PRA's right of access to information in the state Constitution: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, ... the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).) As ***291** amended by the initiative, the Constitution also directs that statutes "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2).)

[2] Despite the value assigned to robust public **disclosure** of government records both in the California Constitution and in the PRA, two statutory exceptions nonetheless exist. The first is section 6255(a), the PRA's catchall provision allowing a government agency to withhold a **public record** if it can demonstrate that "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by **disclosure** of the record." In ***112** determining the propriety of an agency's reliance on the catchall provision to withhold **public records**, the burden of proof is on the agency "to demonstrate a clear overbalance" in

favor of nondisclosure. (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071, 44 Cal.Rptr.3d 663, 136 P.3d 194.) The second is section 6254, which lists certain categories of records exempt from PRA **disclosure**. These exemptions are largely concerned with protecting " 'the privacy of persons whose data or documents come into governmental possession.' " (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282, 48 Cal.Rptr.3d 183, 141 P.3d 288.) [1]

Section 6254(k) is the PRA exemption at issue in this case. This provision allows agencies to withhold "[r]ecords, the **disclosure** of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (§ 6254(k).) [2] By "its reference to the privileges contained in the Evidence Code," section 6254(k) "has made the attorney-client privilege applicable to **public records**." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370, 20 Cal.Rptr.2d 330, 853 P.2d 496 (*Roberts*).) This exemption, we have explained, emphasizes the Legislature's purpose of affording "public entities the attorney-client privilege as to writings to the extent authorized by the Evidence Code." (*Id.* at p. 380, 20 Cal.Rptr.2d 330, 853 P.2d 496, footnote omitted.)

***292** **[3]** As with any of the PRA's statutory exemptions, "the fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document." (*CBS, Inc. v. Block*, *supra*, 42 Cal.3d at p. 653, 230 Cal.Rptr. 362, 725 P.2d 470.) What the PRA appears to offer is a ready solution for records blending exempt and nonexempt information: "Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law." (§ 6253, subd. (a).) While this provision does not dictate which parts of a **public record** are privileged, it requires public agencies to use the equivalent of a surgical scalpel to separate those portions of a record subject to **disclosure** from privileged portions. At the same time, the statute places an express limit on this surgical approach: public agencies are not required to attempt selective **disclosure** of records that are not "reasonably segregable." (*Ibid.*) To the extent this standard is ambiguous, the PRA must be construed in " 'whichever way will further the people's right of ****778** access.' " (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1190, 199 Cal.Rptr.3d 743, 366 P.3d 996; see also Cal. Const., art. I, § 3, subd. (b)(2).)

2. Evidence Code

[4] The attorney-client privilege incorporated into the PRA by section 6254(k) is described in *****113** Evidence Code section 950 et seq., enacted in 1965. (See Evid. Code, div. 8, ch.4, art. 3 ["Lawyer-client Privilege"].) This privilege no doubt holds a special place in the law of our state. (See *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, 208 Cal.Rptr. 886, 691 P.2d 642 (*Mitchell*) ["The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for almost 400 years."].) And for good reason: its "fundamental purpose ... is to safeguard the confidential relationship between clients and their attorneys so as to promote full and frank discussion of the facts and tactics surrounding individual **legal** matters." (*Ibid.* ["the public policy fostered by the privilege seeks to insure 'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense' "].)

To this end, Evidence Code section 954 confers a privilege on the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." A "confidential communication," moreover, is defined as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom **disclosure** is reasonably necessary for the transmission of the information or the accomplishment of the purpose for ***293** which the lawyer is consulted, and includes a **legal** opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code, § 952.)

B. Application to County's Invoices for Legal Services

[5] **[6]** **[7]** As with all questions of statutory interpretation, our foremost task is to give effect to the Legislature's purpose. (See *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037, 175 Cal.Rptr.3d 601, 330 P.3d 912.) In doing so, we analyze the statute's text in its relevant context, as text so read tends to be the clearest, most cogent indicator of a specific provision's purpose in the larger

statutory scheme. We interpret relevant terms in light of their ordinary meaning, while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose. (See *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 378, 33 Cal.Rptr.2d 63, 878 P.2d 1275.)

[8] Not surprisingly, the primary purpose of the Evidence Code provisions at issue in this case is to protect the confidential relationship between client and attorney to promote frank discussion between the two. (See *Mitchell, supra*, 37 Cal.3d at p. 599, 208 Cal.Rptr. 886, 691 P.2d 642.) These provisions do so by prohibiting **disclosure** of any "confidential communication between client and lawyer." (Evid. Code, § 954.) The Evidence Code also states that " 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence ..., and includes a **legal** opinion formed and the advice given by the lawyer in the course of that relationship." (*Id.*, § 952; see also *Costco, supra*, 47 Cal.4th at p. 733, 101 Cal.Rptr.3d 758, 219 P.3d 736 ["the privilege attaches to any **legal** advice given in the course of an attorney-client relationship"].) The key question, then, is this: Would treating **invoices** as sometimes nonprivileged undermine the fundamental purpose of the attorney-client privilege?

***114** The ACLU says no. Merely sending **invoices** to a client, the ACLU contends, does not always "further the purpose of **legal** representation." Rather, **invoices** are meant to help a service provider secure payment for services rendered. The mere fact that an attorney chose to transmit his or her **invoices** in confidence is of no moment, according to **779** the ACLU. Such **invoices** further a separate business purpose that is merely incidental to the attorney-client relationship. We agree —but only up to a point. The attorney-client privilege only protects communications between attorney and client made for the purpose of seeking or delivering the attorney's **legal** advice or representation. Evidence Code section 952 twice states that the privilege **294** extends only to those communications made "in the course of [the attorney-client] relationship," a construction suggesting a nexus between the communication and the attorney's professional role.[3] The Evidence Code also repeatedly refers to "consultation" between the attorney and client. (See *id.*, § 951 [defining a "client" as someone who "consults a lawyer for the purpose of retaining the lawyer or securing **legal** service or advice from him in his professional capacity"]; *id.*, § 952 [defining "confidential communication between client and lawyer" as "information transmitted in confidence by a means which ... discloses to no third persons other than those who are present to further the interest of the client in the consultation or to those to whom **disclosure** is reasonably necessary for ... the accomplishment of the purpose for which the lawyer is consulted"].)

[9] These references underscore that the privilege does not apply to every single communication transmitted confidentially between lawyer and client. Rather, the heartland of the privilege protects those communications that bear some relationship to the attorney's provision of **legal** consultation. (See *Roberts, supra*, 5 Cal.4th at p. 371, 20 Cal.Rptr.2d 330, 853 P.2d 496 [explaining that "under the Evidence Code, the attorney-client privilege applies to confidential communications *within the scope of* the attorney-client relationship" (italics added)]; see also *Costco, supra*, 47 Cal.4th at p. 743, 101 Cal.Rptr.3d 758, 219 P.3d 736 (conc. opn. of George, C.J.) [Evid. Code § 952 "identifies a ' "confidential communication" ' in general terms as meaning 'information transmitted between a client and his or her lawyer in the course of that relationship,' but the provision also supplies more specific examples of what is meant by adding that a confidential communication 'includes a **legal** opinion formed and the advice given by the lawyer in the course of that relationship' " (italics omitted)].)

Justice Werdegar's dissenting opinion suggests that the Evidence Code's definition of the attorney-client privilege forecloses any inquiry into whether a communication is related to **legal** consultation. Yet the Evidence Code's definition of the privilege concerns not only the manner in which information is transmitted, but the nature of the communication. The statute treats the term "confidential communication between client and lawyer" as one that requires further definition, and the definition it provides extends only to that information transmitted "*in the course of* [the attorney-client] relationship." (Evid. Code, § 952, italics added.) The same definition also refers to "those who are present to *further the interest of the client in the consultation*" and "the *accomplishment of the purpose* for which the lawyer is consulted." ***115** (*Ibid.* italics added.) A similar focus is plain in related definitions of the Evidence Code. For example, the statute defines "client"

as someone who "consults a lawyer for the purpose of retaining the lawyer or securing **legal** *295 service or advice from him in his professional capacity." (*Id.*, § 951.) And a "confidential communication between client and lawyer," according to the statute, "includes a **legal** opinion formed and the advice given by the lawyer in the course of that relationship." (*Id.*, § 952.) These references cut against an understanding of the privilege in this context as encompassing every conceivable communication a client and attorney share, and instead link the privilege to communications that bear some relationship to the provision of **legal** consultation.

Invoices for **legal** services are generally not communicated for the purpose of **legal** consultation. Rather, they are communicated for the purpose of **billing** the client and, to the extent they have no other purpose or **780 effect, they fall outside the scope of an attorney's professional representation. (See *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 67, 149 Cal.Rptr.3d 324 [explaining that "the dominant purpose for preparing the [**invoices** to the county] was not for use in litigation but as part of normal record keeping and to facilitate the payment of attorney fees on a regular basis"]; cf. *Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 32, 173 Cal.Rptr. 856 [labor negotiations, which could have been conducted by a nonattorney, "were not privileged unless the dominant purpose of the particular communication was to secure or render **legal** service or advice"].) While **invoices** may convey some very general information about the process through which a client obtains **legal** advice, their purpose is to ensure proper payment for services rendered, not to seek or deliver the attorney's **legal** advice or representation.

This distinction is relevant because, as our opinion in *Costco* confirmed, not every communication between attorney and client is privileged solely because it is confidentially transmitted. Costco had retained a law firm to advise it on whether certain managers were exempt from wage and overtime laws. An attorney at the firm interviewed two Costco managers and then sent the company a confidential 22-page opinion letter. Several years later, some Costco employees filed a lawsuit claiming that Costco had misclassified and underpaid its managers. As part of that litigation, the plaintiffs tried to compel discovery of the attorney's opinion letter. Over Costco's objection, the trial court ordered **disclosure** of the letter, allowing portions of it containing the attorney's impressions, observations, and opinions to be redacted. (*Costco*, *supra*, 47 Cal.4th at pp. 730–731, 101 Cal.Rptr.3d 758, 219 P.3d 736.) The confidential opinion letter at issue in *Costco* was indisputably privileged, and the plaintiffs never claimed otherwise. (See *id.* at pp. 735–736, 101 Cal.Rptr.3d 758, 219 P.3d 736 [the plaintiffs "never disputed" that Costco retained the law firm to provide Costco with "**legal** advice," which was provided in the form of the opinion letter].)

[10] In ruling that Costco did not need to turn over this opinion letter, we took care to explain that the same rule would not apply to all communications *296 between a lawyer and his or her client. The privilege, for example, "is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice [citation]; in that case, the relationship between the parties to the communication is not one of attorney-client." (*Costco*, *supra*, 47 Cal.4th at p. 735, 101 Cal.Rptr.3d 758, 219 P.3d 736.) The same is true when a lawyer is **billing** his or her client: the relationship ***116 evokes an arm's-length transaction between parties in the market for professional services more than it does the diligent but discreet conveyance of facts and advice that epitomizes the bond between lawyer and client. An organization may strongly oppose, and sternly resist, public **disclosure** of its **legal bills**, just as a business adviser or public relations consultant might do the same. But the extent of this resistance does not dictate the scope of the attorney-client privilege.

What *Costco* also reaffirmed is the longstanding principle that "a client cannot protect unprivileged information from discovery by transmitting it to an attorney," though we noted that this "concern [was] not present here." (*Costco*, *supra*, 47 Cal.4th at p. 735, 101 Cal.Rptr.3d 758, 219 P.3d 736; see also *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 397, 15 Cal.Rptr. 90, 364 P.2d 266 [" 'Knowledge which is not otherwise privileged does not become so merely by being communicated to an attorney.' "].) *Costco* thus recognized that not all communications between attorney and client become privileged solely by virtue of the mode of communication (confidential versus not). And though *Costco* made this point with regard to information sent from client to attorney, we see no reason why the reverse situation would require a different rule. After all, a lawyer may well send a government client an e-mail that has

nothing to do with **legal** advice. For example, a lawyer might e-mail details about a firm's efforts to move to a newly constructed office building or host a political fundraiser. Even if these communications are confidential (as would be true for any e-mail communication), they are not made for the ****781** purpose of **legal** consultation and are therefore not protected by the attorney-client privilege.

[11] The same is true for **billing invoices**. While a client's fees have some ancillary relationship to **legal** consultation, an **invoice** listing amounts of fees is not communicated for the purpose of **legal** consultation. The mere fact that an attorney transmitted a communication to his or her client confidentially (in the sense that no one other than the recipient could see the communication) does not end the inquiry into whether the communication's contents are protected by the attorney-client privilege. After all, just about every communication between a lawyer and client is intended to be kept private, regardless of whether the communication has any connection to **legal** consultation at all. Even the fact that the information communicated may have some ancillary bearing on an attorney's relationship to a client (as information about an office move or political fundraiser might have) does not end our inquiry into whether the attorney-client privilege applies. Nor does the fact that an ***297** attorney would prefer to keep the information confidential (as most people would prefer for their emails).

What the inquiry turns on instead is the link between the content of the communication and the types of communication that the attorney-client privilege was designed to keep confidential. In order for a communication to be privileged, it must be made for the purpose of the **legal** consultation, rather than some unrelated or ancillary purpose. As Chief Justice George put it in his concurring opinion in *Costco*: "the communication also must occur 'in the course of' the attorney-client relationship (Evid. Code, § 952)—that is, the communication must have been made for the purpose of the **legal** representation." (*Costco*, *supra*, 47 Cal.4th at p. 742, 101 Cal.Rptr.3d 758, 219 P.3d 736 (conc. opn. of George, C.J.).) Considering Evidence Code section 952 "as a whole," continued Chief Justice George, it becomes "even clearer that the Legislature intended to extend the protection of *****117** the privilege solely to those communications between the lawyer and the client that are made for the purpose of seeking or delivering the lawyer's **legal** advice or representation." (*Costco*, 47 Cal.4th at p. 743, 101 Cal.Rptr.3d 758, 219 P.3d 736 (conc. opn. of George, C.J.).) While Chief Justice George's views are expressed in a concurring opinion, the opinion emphasizes a crucial distinction that is relevant here, between the opinion letter at issue in that case and the **invoices** at issue here. Unlike an opinion letter, a **billing invoice** is not "made for the purpose of the **legal** representation." (*Id.* at p. 742, 101 Cal.Rptr.3d 758, 219 P.3d 736.)

[12] [13] But while **billing invoices** are generally not "made for the purpose of **legal** representation," the information contained within certain **invoices** may be within the scope of the privilege. To the extent that **billing** information is conveyed "for the purpose of **legal** representation"—perhaps to inform the client of the nature or amount of work occurring in connection with a pending **legal** issue—such information lies in the heartland of the attorney-client privilege. And even if the information is more general, such as aggregate figures describing the total amount spent on continuing litigation during a given quarter or year, it may come close enough to this heartland to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role. The attorney-client privilege protects the confidentiality of information in both those categories, even if the information happens to be transmitted in a document that is not itself categorically privileged. When a **legal** matter remains pending and active, the privilege encompasses everything in an **invoice**, including the amount of aggregate fees. This is because, even though the amount of money paid for **legal** services is generally not privileged, an **invoice** that shows a sudden uptick in spending "might very well reveal much of [a government agency]'s investigative efforts and trial strategy." (*Mitchell*, *supra*, 37 Cal.3d at p. 610, 208 Cal.Rptr. 886, 691 P.2d 642.) Midlitigation swings in spending, for example, could reveal an impending filing or outsized concern about a recent event.

***298** [14] The same may not be true for fee totals in **legal** matters that concluded long ago. In contrast to information involving a ****782** pending case, a cumulative fee total for a long-completed matter does not always reveal the substance of **legal** consultation. The fact that the amounts in both cases were communicated in an **invoice** transmitted confidentially from lawyer to client does not automatically make this information privileged. Instead, the privilege turns on whether those amounts

reveal anything about **legal** consultation. Asking an agency to disclose the cumulative amount it spent on long-concluded litigation—with no ongoing litigation to shed light on the context from which such records are arising—may communicate little or nothing about the substance of **legal** consultation. But when those same cumulative totals are communicated during ongoing litigation, this real-time **disclosure** of ongoing spending amounts can indirectly reveal clues about **legal** strategy, especially when multiple amounts over time are compared.

Justice Werdegar is concerned that our opinion suggests the "scope of the privilege somehow wanes with the termination of the subject litigation." But the question at issue here is not, as Justice Werdegar suggests, whether privileged material remains privileged when "the attorney-client relationship has ended." (Dis. opn., *post*, 212 Cal.Rptr.3d at p. 112, 386 P.3d at p. 778.) Even while the scope of the attorney-client privilege remains constant over time, the same *information* (for example, the cumulative amount of money that was ***118** spent on a case) takes on a different significance if it is revealed during the course of active litigation. During active litigation, that information can threaten the confidentiality of **legal** consultation by revealing **legal** strategy. But there may come a point when this very same information no longer communicates anything privileged, because it no longer provides any insight into litigation strategy or **legal** consultation.

[15] Our conclusion that the privilege turns on content and purpose, not form, fits not only with the terms of the statute but also the law as it existed before the Evidence Code was enacted. The Evidence Code was meant to incorporate prior law on the attorney-client privilege. (See Cal. Law Revision Com. com., 29B pt. 3A West's Ann. Evid. Code (2009 ed.) foll. § 952, p. 307 ["The requirement that the communication be made in the course of the lawyer-client relationship and be confidential is in accord with existing law."].) Before 1965, the long-established rule in California was that the attorney-client privilege—then set forth in the Code of Civil Procedure[4]—protected communications made for the purpose of the attorney's professional representation. (See, e.g., *Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 80, 244 P.2d 907 ***299** ["A communication to be privileged must have been made to an attorney acting in his professional capacity toward his client."].)

Further support for this conclusion comes from the language and structure of a related statutory scheme. Business and Professions Code section 6148, subdivision (a), describes the information that a contract for **legal** services (i.e., a fee agreement) must generally contain. Subdivision (b), on the other hand, describes the information that attorney **billing** statements (such as **invoices**) must generally contain. (See *id.*, § 6148, subd. (b).) But Business and Professions Code section 6149 states that only *fee agreements* "shall be deemed to be a confidential communication within the meaning of ... Section 952 of the Evidence Code." This section makes no mention of **billing** statements or **invoices**. The Legislature's decision to define both fee agreements and **billing** statements in one section, while in the very next section subjecting only the former to the attorney-client privilege, suggests that the privilege was not intended to protect both fee agreements and **invoices** in the exact same way. (See *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576, 273 Cal.Rptr. 584, 797 P.2d 608 ["When the Legislature 'has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.' "].)[5]

****783** These arguments help explain why California courts have generally presumed that **invoices** for **legal** services are *not* categorically privileged. (See, e.g., *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1326–1327, 168 Cal.Rptr.3d 40 ["we seriously doubt that all—or even most—of the information on each of the **billing** records proffered to the court was privileged"].) Indeed, **disclosure** of **billing** ***119** **invoices** is the norm in the federal courts in California, where "[f]ee information is generally not privileged." (*Federal Sav. & Loan Ins. Corp. v. Ferm* (9th Cir. 1990) 909 F.2d 372, 374; see also *Tornay v. U.S.* (9th Cir. 1988) 840 F.2d 1424, 1426 ["Payment of fees is incidental to the attorney-client relationship, and does not usually involve **disclosure** of confidential communications arising from the professional relationship."].) Our holding today is consistent with that approach—an approach with which the County, a frequent litigant in federal court, is undoubtedly familiar.

None of the County's remaining arguments supports the conclusion that all information in attorney **invoices** is categorically privileged. In particular, the County observes that **disclosure** of **invoices** can provide adversaries a window ***300** into litigation strategies—"a road map

as to how the matter is being litigated, or may be litigated in the future." We are sensitive to the County's concern here, but this concern does not require the rule that Court of Appeal established and that the County insists on, which is a categorical bar on **disclosure** of a government agency's expenditures for any **legal** matter, past or present, active or inactive, open or closed. Though the PRA carves out an exemption for privileged portions of government records, "[t]he fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document." (*CBS, Inc. v. Block*, *supra*, 42 Cal.3d at p. 653, 230 Cal.Rptr. 362, 725 P.2d 470.) Instead, government agencies must disclose "[a]ny reasonably segregable portion" of a **public record** "after deletion of the portions that are exempted by law." (§ 6253, subd. (a).)

III. CONCLUSION

The imperative of protecting privileged communications between attorney and client—and thereby promoting full and frank discussion between them—is a defining feature of our law. This imperative does not require us to conclude—as the Court of Appeal did here—that everything in a public agency's **invoices** for **legal** services is categorically privileged. Instead, the contents of an **invoice** are privileged only if they either communicate information for the purpose of **legal** consultation or risk exposing information that was communicated for such a purpose. This latter category includes any **invoice** that reflects work in active and ongoing litigation. Accordingly, we reverse the judgment of the Court of Appeal and remand for proceedings consistent with our opinion.

We Concur:

Chin, J.

Liu, J.

Kruger, J.

DISSENTING OPINION BY WERDEGAR, J.

The importance of the attorney-client evidentiary privilege to the proper functioning of the **legal** system in this state cannot be overstated. "The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for almost 400 years. [Citations.] The privilege authorizes a client to refuse to disclose, and to prevent others from disclosing, confidential communications between attorney and client. (Evid. Code, § 950 et seq.) Clearly, the fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual **legal** matters. [Citation.] In other words, the public policy fostered by the privilege seeks ****784** to insure 'the right of every person to freely and *****120** fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.' " (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, 208 Cal.Rptr. 886, 691 P.2d 642, fn. omitted.) "Although exercise of the privilege ***301** may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship." (*Ibid.*)

With today's decision, a majority of the court undermines this pillar of our jurisprudence, finding **legal invoices** sent from a law firm to its client, although initially protected by the attorney-client privilege, may lose such protection once the subject litigation is concluded. This conclusion finds no support in the plain meaning of the words of the attorney-client privilege as set forth in Evidence Code section 954, [1] and are in fact contrary to a recent decision by this court interpreting the scope of the privilege. I respectfully dissent.

I.

The attorney-client privilege is set forth in section 954 and provides in pertinent part that a "client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer...." The phrase " 'confidential communication between client and lawyer' " is, as relevant here, defined in section 952 as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence ... and includes a **legal** opinion formed and the advice given by the lawyer in the course of that relationship." No question exists that the **invoices** at issue in this case comprise "information transmitted" between a law firm and its

client, the Los Angeles County Board of Supervisors,[2] that the information was generated within the course of the attorney-client relationship, and that the **invoices** were prepared and ***302** transmitted in confidence. As such, the **invoices** are privileged, and thus not subject to **disclosure** under the **Public Records Act**. (Gov. Code, § 6254, subd. (k).)[3]

****121** The majority reaches a different conclusion by embellishing the words of the statutory privilege to discover a heretofore hidden meaning. According to the majority, the "key question" is: "Would treating **invoices** as sometimes nonprivileged *undermine the fundamental purpose* of the attorney-client privilege?" (Maj. opn., *ante*, 212 Cal.Rptr.3d at p. 113, 386 P.3d at p. 778, italics added.) The opinion then reasons the privilege protects only those "communications between attorney and client *made for the purpose of seeking or delivering the attorney's legal advice or representation.*" (*Ibid.* italics added.) Therefore, concludes the majority, "the privilege ***785** does not apply to every single communication transmitted confidentially between lawyer and client. Rather, the heartland of the privilege protects those communications *that bear some relationship to the attorney's provision of legal consultation.*" (*Id.* at p. 114, 386 P.3d at p. 779, italics added.)

The majority's decision to add consideration of a communication's purpose as an additional, nonstatutory element to the Legislature's definition of a "confidential communication" is unsupported in law. Absent those rare situations in which the attorney-client privilege facilitates a person's constitutional rights under the Sixth Amendment,[4] the evidentiary privilege at issue in this case is statutory only. As we have recognized, "[o]ur deference to the Legislature is particularly necessary when we are called upon to interpret the attorney-client privilege, because the Legislature has determined that evidentiary privileges shall be available only as defined by statute. (Evid. Code, § 911.) Courts may not add to the statutory privileges except as required by state or federal constitutional law [citations], *nor may courts imply unwritten exceptions to existing statutory privileges.*" (*Roberts v. City of Palmdale*, *supra*, 5 Cal.4th at p. 373, 20 Cal.Rptr.2d 330, 853 P.2d 496, italics added.) As the California Law Revision Commission has commented, "privileges are not recognized in the absence of statute," and "[t]his is one of the few instances where the Evidence Code ***303** precludes the courts from elaborating upon the statutory scheme." (Cal. Law Revision Com. com., 29B pt. 3A West's Ann. Evid. Code, foll. § 911, at p. 219.)

This court recently spoke to the scope of the attorney-client privilege in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736 (*Costco*). In *Costco*, the issue, as in the instant case, concerned a communication between a lawyer and client that arguably contained both confidential information (in the form of **legal** opinions) and nonconfidential information (such as facts obtained from witnesses). The *Costco* plaintiffs contended they were entitled to discovery of the nonprivileged portions of a letter **legal** counsel sent to the defendant. Interpreting sections 952 and 954, this court unanimously rejected the claim, explaining that "[t]he attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication *irrespective of whether it includes unprivileged material.* As we explained in *Mitchell v. Superior Court*, *supra*, 37 Cal.3d at page 600, 208 Cal.Rptr. 886, 691 P.2d 642: '[T]he privilege covers the transmission of documents which are available to the public, ****122** and not merely information in the sole possession of the attorney or client. In this regard, *it is the actual fact of the transmission which merits protection*, since discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy.' " (*Costco*, *supra*, at p. 734, 101 Cal.Rptr.3d 758, 219 P.3d 736, italics added.) Further, " '[n]either the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between "factual" and "**legal**" information.' " (*Ibid.*)

The majority seemingly embraces the notion that courts may parse a **legal** communication to permit **disclosure** of those parts that were not "made for the purpose of **legal** consultation" (maj. opn., *ante*, 212 Cal.Rptr.3d at p. 116, 386 P.3d at p. 780), but strains to distinguish *Costco*, *supra*, 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736, unconvincingly suggesting that when an attorney **bills** a client for **legal** services rendered, he or she steps outside the role of a lawyer and into the role of accountant. (Maj. opn., *ante*, at p. 116, 386 P.3d at p. 780 ["the relationship evokes an arm's-length transaction between parties in the market for professional services more than

it does the diligent but discreet conveyance of facts and advice that epitomizes the bond between lawyer and client"].) Accordingly, reasons the majority, **legal billing invoices** may fall outside the protection of the attorney-client ****786** privilege because they "are not made for the purpose of **legal** consultation." (*Id.* at p. 116, 386 P.3d at p. 780.) But this is not a situation in which an attorney is acting as something other than a **legal** representative, such as a real estate agent or business advisor; the **invoice** in question was for **legal** services rendered.

More to the point, the majority's line of analysis ignores the core reasoning of *Costco* that section 954 prohibits courts from parsing a communication ***304** between lawyer and client in order that those parts not involving a **legal** opinion or advice can be disclosed. As *Costco* explained, despite what might be the dominant purpose of a communication, "when the communication is a confidential one between attorney and client, *the entire communication, including its recitation or summary of factual material, is privileged.*" (*Costco, supra,* 47 Cal.4th at p. 736, 101 Cal.Rptr.3d 758, 219 P.3d 736, italics added.) *Costco*'s analysis, applied here, leads inexorably to the conclusion that the **legal invoices** at issue are privileged under sections 952 and 954.[5]

Even more pernicious than the majority's improper addition of a nonstatutory prerequisite to the attorney-client privilege, and its unconvincing attempt to distinguish *Costco*, *supra*, 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736, is its suggestion that the protective scope of the privilege somehow wanes with the termination of the subject litigation. Thus, the *****123** majority opines that "[w]hen a **legal** matter remains pending and active, the privilege encompasses everything in an **invoice**—including the amount of aggregate fees." (Maj. opn., *ante*, 212 Cal.Rptr.3d at p. 117, 386 P.3d at p. 781.) But the majority then suggests a more limited rule of privilege may apply once the litigation ends, saying that "[t]he same may not be true for fee totals in **legal** matters that concluded long ago." (*Ibid.*) That the majority fails to cite any language in sections 952 or 954 supporting such a rule is unsurprising, for nothing in the Evidence Code supports the notion that the reach of the attorney-client privilege is different for pending litigation versus **legal** matters that have concluded.

Indeed, **legal** authority is to the contrary. In *Littlefield v. Superior Court* (1982) 136 Cal.App.3d 477, 186 Cal.Rptr. 368, a defendant in a criminal case sought a writ of mandate to force his codefendant to testify and reveal confidential conversations he had with his lawyer, the Los Angeles County Public Defender. (It was the defendant's contention the public defender had disclosed facts about the alleged murders to the codefendant, which allowed him to fabricate testimony detrimental to the defendant.) Although the defendant acknowledged the communications were presumptively protected by the attorney-client privilege, he argued "that privilege may be deemed attenuated because the attorney/client relationship is 'near an end.' " (*Id.* at p. 481, 186 Cal.Rptr. 368.) The appellate court properly disagreed, explaining that "the ***305** attorney/client privilege continues even after the end of threat of punishment" (*id.* at p. 482, 186 Cal.Rptr. 368), and that "[n]othing in the statutes controlling the privilege suggests it is to be limited or diminished in importance as a function of the continuance of the relationship that existed at the time of the confidential communications herein sought" (*ibid.*). In other words, the protective power of the attorney-client privilege is not reduced simply because the attorney-client relationship has ended or is about to end. (Cf. *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 66, 24 Cal.Rptr.3d 199, 105 P.3d 560 [attorney-client privilege continues to ****787** protect covered communications until no person or entity exists who is statutorily authorized to assert it].)

Secondary sources are even more pointed. The attorney-client privilege "attaches upon the initial consultation ... and continues beyond the end of the attorney-client relationship for so long as a 'holder' is in existence." (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2003) ¶ 7:265, p. 7-114 (Aug. 2016 Update).) "The right to claim the attorney-client privilege is not limited to the litigation or controversy in the course of which a protected communication was made. *It survives the termination of litigation* and continues even after the threat of liability or punishment has passed." (*Id.*, ¶ 7:269, p. 7-115, italics added.)

The majority's suggestion the protective power of the attorney-client privilege under section 954 "may not" (maj. opn., *ante*, 212 Cal.Rptr.3d at p. 117, 386 P.3d at p. 781) continue to encompass all portions of a document that previously qualified as a "confidential communication" under section 952 is mischievous in

the extreme. Following today's decision, attorneys in this state must counsel their clients that confidential communications between lawyer and client, previously protected by the attorney-client privilege, may be forced into the open by interested parties once the subject litigation has concluded. If a limiting principle applies to this new rule, it is not perceptible to me. [6]

***124 Nor is it any saving grace that "disclosure of billing invoices is the norm in the federal courts in California, where '[f]ee information is generally not privileged.' " (Maj. opn, *ante*, 212 Cal.Rptr.3d at p. 119, 386 P.3d at p. 783.) Although by this argument the majority suggests that a strong weight of legal opinion backing its views exists in the federal universe, such support is ephemeral. The cases cited by the majority rely on Federal Rule of Evidence 501, which *306 simply incorporates federal common law. [7] By contrast, the scope of the attorney-client privilege in California state courts is governed by the detailed and specific definition of a "confidential communication" as set forth in section 952. The majority's comparison of apples to oranges is thus unpersuasive.

II.

As noted above, the conclusion reached by the majority today is inconsistent with our interpretation of section 952 in *Costco*, *supra*, 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736. But even setting *Costco* aside, this court is simply not free to add elements and prerequisites to a statutory rule of evidentiary privilege. Whether it might be wise policy to find a "confidential communication" within the meaning of section 952 must be one "made for the purpose of seeking or delivering the attorney's legal advice or representation" (maj. opn., *ante*, 212 Cal.Rptr.3d at p. 114, 386 P.3d at p. 779), is a question more properly consigned to the discretion of the Legislature and not this court.

I dissent.

We Concur:

**788 Cantil-Sakauye, C.J.

Corrigan, J.

All Citations

2 Cal.5th 282, 386 P.3d 773, 212 Cal.Rptr.3d 107, 2016 Daily Journal D.A.R. 12,740

Footnotes

1 The 2004 voter initiative preserved these exemptions. (See Cal. Const., art. I, § 3, subd. (b)(5); see also *International Federation of Professional and Technical Engineers, Local 21, AFL–CIO v. Superior Court* (2007) 42 Cal.4th 319, 329, fn. 2, 64 Cal.Rptr.3d 693, 165 P.3d 488.)

2 As first enacted in 1968, section 6254(k) read: "Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (§ 6254(k), as enacted by Stats. 1968, ch. 1473, § 39, p. 2947.) In 1981, the Legislature used identical language when repealing and reenacting section 6254(k). (Stats. 1981, ch. 684, §§ 1, 1.5, pp. 2484-2491.) The Legislature has since amended this subdivision only once, deleting the first use of the phrase "provisions of" in 1991. (Stats. 1991, ch. 607, § 4, p. 2758.)

3 The phrase "in the course of that relationship" has appeared unchanged in Evidence Code section 952 since its enactment in 1965.

4 "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." (Code Civ. Proc., former § 1881, subd. 2, enacted in 1872 and repealed by Stats. 1965, ch. 299, § 2, p. 1297 [enacting Evid. Code].)

5 The reason for this discrepancy, according to the County, is that invoices "so obviously met [Evidence Code section 952's] definition of communications" that the Legislature saw no need to specify that they were privileged. We are not convinced. As explained above, we do not think Evidence Code section 952 categorically protects invoices. And, in any event, whether it does is far from "obvious[ ]."

1 All statutory references are to the Evidence Code unless otherwise stated.

2 Although we may presume for purposes of argument the fee **invoices** considered here do not include a "**legal** opinion formed" or "advice given" within the course of that relationship, section 952's use of the term "includes" means that the scope of the privilege is *not limited* to **legal** opinions and advice. " '[I]ncludes' [is] ordinarily a term of enlargement rather than limitation." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101, 17 Cal.Rptr.2d 594, 847 P.2d 560.) "The 'statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.' " (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774, 117 Cal.Rptr.2d 574, 41 P.3d 575.) The majority does not dispute that the attorney-client privilege covers more than just **legal** opinions and advice, but nevertheless asserts language in various sub-clauses of section 952 mean the attorney-client privilege covers only "communications that bear some relationship to the provision of **legal** consultation." (Maj. opn., *ante*, 212 Cal.Rptr.3d at p. 115, 386 P.3d at p. 779.) As I explain, *post*, this interpretation of sections 954 and 952 is far too narrow and contrary to existing authority.

3 Government Code section 6254, subdivision (k) states that the **Public Records Act** does not require **disclosure** of the following records: "Records, the **disclosure** of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, *provisions of the Evidence Code relating to privilege*." (Italics added.) "By its reference to the privileges contained in the Evidence Code, therefore, the **Public Records Act** has made the attorney-client privilege applicable to **public records**." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370, 20 Cal.Rptr.2d 330, 853 P.2d 496.)

4 See, e.g., *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 751, 157 Cal.Rptr. 658, 598 P.2d 818 ("if an accused is to derive the full benefits of his [constitutional] right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney"), relying on *Fisher v. United States* (1976) 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39.

5 To the extent the majority relies on former Chief Justice George's concurring opinion in *Costco* (maj. opn, *ante*, 212 Cal.Rptr.3d at p. 116–117, 386 P.3d at p. 780–781), it mischaracterizes his views. (*Costco*, *supra*, 47 Cal.4th at pp. 741–744, 101 Cal.Rptr.3d 758, 219 P.3d 736 conc. opn. of George, C.J.). In a separate opinion, former Chief Justice George distinguished the situation in which information is transmitted between the client and the lawyer in the course of the attorney-client relationship, which information is privileged, from the situation in which information is communicated to an attorney outside the context of an attorney-client relationship, which information is unprivileged. "[A] communication in the context of section 952 need not concern litigation; rather it suffices that the communication consist of information transmitted between the client and the lawyer *within the scope* of the attorney-client relationship." (*Id.* at p. 743, 101 Cal.Rptr.3d 758, 219 P.3d 736 (conc. opn. of George, C. J.).)

6 The majority confusingly asserts "the scope of the attorney-client privilege remains constant over time," but that, after an undetermined period of time, privileged "*information* ... takes on a different significance" (maj. opn., *ante*, 212 Cal.Rptr.3d at p. 117, 386 P.3d at p. 782, italics added), such that it can lose its confidential status. But if the scope of the privilege is constant over time, how information—once privileged—nevertheless loses its protected status is unexplained by the majority. If the majority is saying that a court may refuse to recognize the privileged status of once-privileged information if it determines the information is no longer of strategic value to a litigant, I disagree, and further observe the majority cites no authority for this remarkable position.

7 Rule 501 of the Federal Rules of Evidence (28 U.S.C.) states in pertinent part: "The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court."

But the same rule goes on to suggest the primacy of state law rules of privilege, providing that, "in a civil case, *state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.*" (*Ibid.* italics added.)

12 Cal.App.5th 1264
Court of Appeal, Second
District, Division 3, California.

COUNTY OF LOS ANGELES BOARD
OF SUPERVISORS et al., Petitioners,
v.
The SUPERIOR COURT of Los
Angeles County, Respondent;
ACLU of Southern California
et al., Real Parties in Interest.

No. B257230
|
Filed 6/5/2017

Synopsis
Background: After county produced copies of records from cases that were no longer pending, with alleged attorney-client privileged and work-product information redacted, pursuant to request submitted by civil liberties organization under **Public Records Act** (PRA), seeking **invoices** specifying amounts that county had been **billed** by any law firm in connection with lawsuits brought by inmates involving alleged jail violence, organization filed petition for writ of mandate, seeking to compel county to disclose records for all lawsuits, not just those that were no longer pending. The Superior Court, Los Angeles County, No. BS145753, Luis A. Lavin, J., granted petition insofar as it pertained to **billing** records. County filed petition for writ of mandate, challenging trial court's ruling. The Court of Appeal granted county's petition. Civil liberties organization petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal, and the Supreme Court, 2 Cal.5th 282, 386 P.3d 773, 212 Cal.Rptr.3d 107, reversed and remanded.

Holdings: On remand, the Court of Appeal, Aldrich, J., held that:

[1] **invoices** related to pending or ongoing litigation were privileged;

[2] whether fee totals in long-concluded litigation was privileged was a factual question for the trial court; and

[3] redacted portions of law firm **invoices** in concluded matters were not subject to **disclosure**.

Petition granted; writ issued.

West Headnotes (6)

[1] **Records**
Internal memoranda or letters;executive privilege

Law firm **billing invoices** related to pending or ongoing litigation brought by inmates involving alleged jail violence were privileged and not subject to **disclosure** under the **Public Records Act**. Cal. Gov't Code § 6254(k).

Cases that cite this headnote

[2] **Records**
Internal memoranda or letters;executive privilege

Law firm **billing invoices** related to pending or ongoing litigation are privileged and are not subject to **Public Records Act disclosure**. Cal. Gov't Code § 6254(k); Cal. Evid. Code § 915.

Cases that cite this headnote

[3] **Records**
Judicial enforcement in general

Whether **disclosure** of law firm **billing** fee totals in long-concluded jail violence litigation was privileged under the **Public Records Act** was a factual question for the trial court in the first instance. Cal. Gov't Code § 6254(k).

Cases that cite this headnote

[4] **Records**
Internal memoranda or letters;executive privilege

Redacted portions, other than fee totals, of law firm **invoices** in concluded prisoner litigation matters were not subject to **disclosure** under the **Public Records Act**;

billing entries or portions of **invoices** providing insight into litigation strategy or **legal** consultation, the substance of **legal** consultation, or clues about **legal** strategy were privileged, as well as any information from the lawyer to the client regarding the amount and nature of work performed, and court was not authorized to examine the redacted information absent any waiver of the privilege. Cal. Gov't Code § 6254(k); Cal. Evid. Code § 915.

Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**

Attorney-Client Privilege

A trial court generally may not require a litigant to disclose assertedly attorney-client privileged information in order to rule upon the claim of privilege.

Cases that cite this headnote

[6] **Records**

Internal memoranda or letters;executive privilege

A trial court, faced with a claim that information contained in **invoices** sought under the **Public Records Act** is protected by the attorney-client privilege, is not permitted, absent the consent of the party asserting the privilege, to examine the **invoices** to determine whether specific **billing** entries reveal anything about **legal** consultation or provide insight into litigation strategy. Cal. Gov't Code § 6254(k); Cal. Evid. Code § 915.

See 2 Witkin, Cal. Evidence (5th ed. 2012) Witnesses, § 303 et seq.

Cases that cite this headnote

****675** ORIGINAL PROCEEDINGS in mandate. Luis A. Lavin, Judge. Petition granted and matter remanded for further proceedings. (Los Angeles County Super. Ct. No. BS145753)

Attorneys and Law Firms

Mary C. Wickham, John F. Krattli, Mark J. Saladino, County Counsel, Roger H. Granbo, Assistant County Counsel, Jonathan McCaverty, Deputy County Counsel; Greines, Martin, Stein & Richland, Timothy T. Coates, Los Angeles, and Barbara W. Ravitz for Petitioners.

****676** Horvitz & Levy, Lisa Perrochet, Steven S. Fleischman and Jean M. Doherty, Burbank, for Association of Southern California Defense Counsel as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Peter J. Eliasberg; Davis Wright Tremaine, Jennifer L. Brockett, Rochelle L. Wilcox, Los Angeles, Colin D. Wells, San Francisco, Diana Palacios and Nicolas A. Jampol, Los Angeles, for Real Parties in Interest ACLU of Southern California and Eric Preven.

Opinion

ALDRICH, J.

***1269** This writ proceeding returns to us on remand from the California Supreme Court. Real parties in interest the ACLU of Southern California and Eric Preven (collectively the ACLU) sought **disclosure** under the California **Public Records Act** (PRA) of **billing invoices** sent to petitioner the County of Los Angeles Board of Supervisors (the County) by its outside attorneys. The superior court granted the ACLU's petition for writ of mandate and compelled **disclosure**, and the County challenged that decision via a petition for a writ of mandate in this court. In our original opinion, we concluded that the subject **invoices** were confidential communications within the meaning of Evidence Code section 952, and therefore were protected by the attorney-client privilege and exempt from **disclosure** under Government Code section 6254, subdivision (k). Accordingly, we granted the County's writ petition. The California Supreme Court granted review, reversed our decision, and remanded for further proceedings. (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 300, 212 Cal.Rptr.3d 107, 386 P.3d 773 (*Los Angeles County*).) Applying the analysis mandated by *Los Angeles County*, and having considered supplemental briefs from the parties, we grant the County's writ petition and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The ACLU's PRA request and the County's response*

Following several publicized inquiries into allegations of excessive force in the Los Angeles County jail system, the ACLU submitted a PRA request to the County and the Office of the Los Angeles County Counsel for **invoices** specifying the amounts **billed** by any law firm in connection with nine different lawsuits alleging excessive force against jail inmates. The ACLU sought the documents to enable it to " 'determine what work was being done on the lawsuits, the scope of that work, the quality of the representation, and the efficiency of the work.' "

The County agreed to produce copies of the requested **invoices** related to three such lawsuits that were no longer pending, with attorney-client privileged and work product information redacted. It declined to provide **invoices** for the remaining six lawsuits, which were still pending. According to the County, the "detailed description, timing, and amount of attorney work performed, which communicates to the client and discloses attorney strategy, tactics, thought processes and analysis" were privileged and therefore exempt from **disclosure** under Government Code section 6254, subdivision (k), as well as under the PRA's "catchall" exemption, ***1270** Government Code section 6255, subdivision (a). It also argued that the information contained in the **invoices** was the same type of information deemed to be confidential under Business and Professions Code sections 6148 and 6149, and therefore these provisions supported the conclusion that the privilege applied.

2. *The ACLU's petition for writ of mandate in the superior court*

The ACLU filed a petition for writ of mandate in the superior court seeking to ****677** compel the County to "comply with the [PRA]" and disclose the requested records for all nine lawsuits. The ACLU averred: "Current and former jail inmates have brought numerous lawsuits against the County and others for alleged excessive force. The County has retained a number of law firms to defend against these suits. It is believed that the selected law firms may have engaged in 'scorched earth' litigation tactics and dragged out cases even when a settlement was in the best interest of the County or when a settlement was likely. Given the issues raised by the allegations in these complaints and the use of taxpayer dollars to pay for the alleged use of scorched earth litigation tactics, the public has a right and interest in ensuring the transparent and efficient use of taxpayer money." The ACLU argued that the **billing** records were not generally protected by the attorney-client or work product privileges, or by the Business and Professions Code sections, and did not fall within any of the statutory exceptions to the PRA.

The superior court granted the petition. It held that the County had failed to show the **billing** records were attorney-client privileged communications or fell within the PRA's "catchall" exemption. Accordingly, it ordered the County to release "all **invoices** issued by the County's outside attorneys in the nine cases specified" in the PRA request. However, it allowed that "[t]o the extent any documents that are responsive to the Requests reflect an attorney's **legal** opinion or advice, or reveal an attorney's mental impressions or theories of the case, such limited information may be redacted."

3. *The County's petition for writ of mandate in this court and the ACLU's petition for review*

The County then filed a petition for writ of mandate in this court. We granted the petition and vacated the superior court's ruling. Relying primarily on *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736 (*Costco*), we concluded that the **invoices** were privileged communications within the meaning of Evidence Code section 952, and therefore exempt from PRA **disclosure**. We did not reach the parties' contentions regarding the "catchall" exemption or Business and Professions Code sections 6148 and 6149.

***1271** The Supreme Court then granted the ACLU's petition for review. A divided panel of the court reversed our decision and remanded for further proceedings.

DISCUSSION

1. *The Los Angeles County decision*

The majority in *Los Angeles County* reasoned as follows. The court first reiterated the PRA's intent to increase freedom of information, its constitutional underpinning, and the relevant exceptions to the **disclosure** requirements.

(*Los Angeles County, supra,* 2 Cal.5th at pp. 290-292, 212 Cal.Rptr.3d 107, 386 P.3d 773.) It then noted that the fundamental purpose of the attorney-client privilege —which holds a "special place" in California law—is to safeguard the confidential relationship between client and attorney and promote frank discussion between the two. (*Id.* at p. 292, 212 Cal.Rptr.3d 107, 386 P.3d 773.)

Turning to the "key question" of whether "treating **invoices** as sometimes nonprivileged" would undermine the fundamental purpose of the attorney-client privilege, the court implemented a content-based test, reasoning that the attorney-client privilege "turns on content and purpose, not form." (*Los Angeles County, supra,* 2 Cal.5th at pp. 293, 298, 212 Cal.Rptr.3d 107, 386 P.3d 773.) Relying heavily ****678** on former Chief Justice George's concurring opinion in *Costco, supra,* 47 Cal.4th 725, 101 Cal.Rptr.3d 758, 219 P.3d 736, the court explained: "The attorney-client privilege only protects communications between attorney and client made for the purpose of seeking or delivering the attorney's **legal** advice or representation. Evidence Code section 952 twice states that the privilege extends only to those communications made 'in the course of [the attorney-client] relationship,' a construction suggesting a nexus between the communication and the attorney's professional role. The Evidence Code also repeatedly refers to 'consultation' between the attorney and client. [Citations.] [¶] These references underscore that the privilege does not apply to every single communication transmitted confidentially between lawyer and client. Rather, the heartland of the privilege protects those communications that bear some relationship to the attorney's provision of **legal** consultation. [Citations.]" (*Los Angeles County*, at pp. 293-294, 212 Cal.Rptr.3d 107, 386 P.3d 773 fn.omitted.) Thus, "the inquiry turns on ... the link between the content of the communication and the types of communication that the attorney-client privilege was designed to keep confidential. In order for a communication to be privileged, it must be made for the purpose of the **legal** consultation, rather than some unrelated or ancillary purpose." (*Id.* at p. 297, 212 Cal.Rptr.3d 107, 386 P.3d 773.)

Invoices, the court concluded, "are generally not communicated for the purpose of **legal** consultation. Rather, they are communicated for the purpose of **billing** the client and, to the extent they have no other purpose or ***1272** effect, they fall outside the scope of an attorney's professional representation." (*Los Angeles County, supra,* 2 Cal.5th at p. 295, 212 Cal.Rptr.3d 107, 386 P.3d 773.) Although **invoices** have an "ancillary relationship" to **legal** consultation and may convey "some very general information about the process through which a client obtains **legal** advice," their "purpose is to ensure proper payment for services rendered, not to seek or deliver the attorney's **legal** advice or representation." (*Id.* at pp. 295, 296, 212 Cal.Rptr.3d 107, 386 P.3d 773.) When a lawyer **bills** his or her client, "the relationship evokes an arm's-length transaction between parties in the market for professional services more than it does the diligent but discreet conveyance of facts and advice that epitomizes the bond between lawyer and client." (*Id.* at p. 296, 212 Cal.Rptr.3d 107, 386 P.3d 773.)

Nevertheless, *Los Angeles County* recognized that although **billing invoices** are generally not made for the purpose of **legal** representation, "the information contained within certain **invoices** may be within the scope of the privilege. To the extent that **billing** information is conveyed 'for the purpose of ... **legal** representation'—perhaps to inform the client of the nature or amount of work occurring in connection with a pending **legal** issue—such information lies in the heartland of the attorney-client privilege. And even if the information is more general, such as aggregate figures describing the total amount spent on continuing litigation during a given quarter or year, it may come close enough to this heartland to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role. The attorney-client privilege protects the confidentiality of information in both those categories, even if the information happens to be transmitted in a document that is not itself categorically privileged. When a **legal** matter remains pending and active, the privilege encompasses everything in an **invoice**, including the amount of aggregate fees. This is because, even though the amount of money paid for **legal** services is ****679** generally not privileged, an **invoice** that shows a sudden uptick in spending 'might very well reveal much of [a government agency]'s investigative efforts and trial strategy.' [Citation.] Midlitigation swings in spending, for example, could reveal an impending filing or outsized concern about a recent event." (*Los Angeles County, supra,* 2 Cal.5th at p. 297, 212 Cal.Rptr.3d 107, 386 P.3d 773.)

Continuing, the court differentiated between pending and concluded matters. "The same may not be true for fee totals in legal matters that concluded long ago. In contrast to information involving a pending case, a cumulative fee total for a long-completed matter does not always reveal the substance of legal consultation. The fact that the amounts in both cases were communicated in an invoice transmitted confidentially from lawyer to client does not automatically make this information privileged. Instead, the privilege turns on whether those amounts reveal anything about legal consultation. Asking an agency to disclose the cumulative amount it spent on long-concluded litigation—with no ongoing litigation to shed light on the context *1273 from which such records are arising—may communicate little or nothing about the substance of legal consultation. But when those same cumulative totals are communicated during ongoing litigation, this real-time disclosure of ongoing spending amounts can indirectly reveal clues about legal strategy, especially when multiple amounts over time are compared." (*Los Angeles County, supra,* 2 Cal.5th at p. 298, 212 Cal.Rptr.3d 107, 386 P.3d 773.) "Even while the scope of the attorney-client privilege remains constant over time, the same *information* (for example, the cumulative amount of money that was spent on a case) takes on a different significance if it is revealed during the course of active litigation. During active litigation, that information can threaten the confidentiality of legal consultation by revealing legal strategy. But there may come a point when this very same information no longer communicates anything privileged, because it no longer provides any insight into litigation strategy or legal consultation." (*Id.* at p. 298, 212 Cal.Rptr.3d 107, 386 P.3d 773.) The court concluded that "the contents of an invoice are privileged only if they either communicate information for the purpose of legal consultation or risk exposing information that was communicated for such a purpose. This latter category includes any invoice that reflects work in active and ongoing litigation." (*Id.* at p. 300, 212 Cal.Rptr.3d 107, 386 P.3d 773.)

Consistent with its content-based test and conclusion that invoices are not categorically privileged, *Los Angeles County* requires PRA disclosure of nonprivileged content in an invoice regardless of whether the invoice contains other, privileged information. The court explained: "As with any of the PRA's statutory exemptions, '[t]he fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document.' [Citation.] What the PRA appears to offer is a ready solution for records blending exempt and nonexempt information: 'Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.' (§ 6253, subd. (a).) While this provision does not dictate which parts of a public record are privileged, it requires public agencies to use the equivalent of a surgical scalpel to separate those portions of a record subject to disclosure from privileged portions. At the same time, the statute places an express limit on this surgical approach—public agencies are not required to attempt selective disclosure of records that are not 'reasonably segregable.' **680 [Citation.] To the extent this standard is ambiguous, the PRA must be construed in ' "whichever way will further the people's right of access." ' [Citations.]" (*Los Angeles County, supra,* 2 Cal.5th at p. 292, 212 Cal.Rptr.3d 107, 386 P.3d 773.) Thus, the " 'fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document.' " (*Id.* at p. 300, 212 Cal.Rptr.3d 107, 386 P.3d 773.)

2. *Application here*

[1] [2] Applying *Los Angeles County,* it is clear that insofar as the superior court ordered PRA disclosure of invoices related to pending matters, it erred. *1274 *Los Angeles County* teaches that invoices related to pending or ongoing litigation are privileged and are not subject to PRA disclosure. (*Los Angeles County, supra,* 2 Cal.5th at p. 297, 212 Cal.Rptr.3d 107, 386 P.3d 773 ["When a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees"].)

The ACLU represents that during the pendency of its appeal, four of the six formerly pending cases have been concluded. They aver that these "changed circumstances have impacted the County's obligations" under the PRA. As to the invoices for closed matters that the County previously provided, the ACLU complains the County used an incorrect, overbroad standard when making redactions, and insists it is entitled to "evidentiary review of those redactions." It seeks disclosure of specific billing entries and " 'descriptions of work performed' " to enable it, for example, to determine "how much time the County's attorneys ... spent opposing a motion to compel that the court granted and for which the court found the [C]ounty's legal position for refusing

to produce documents completely untenable." Thus, the ACLU suggests the "trial court should be directed to evaluate the redactions" in the closed cases to determine whether additional information should be disclosed. The ACLU also avers that the trial court should be "directed to evaluate the **invoices**" in the matters that have concluded during the pendency of their appeal to determine if information must be disclosed.

[3] We agree that the matter must be remanded for a hearing as to whether fee totals related to concluded matters must be disclosed. *Los Angeles County* explained that "fee totals in **legal** matters that concluded long ago" "may not" be confidential. (*Los Angeles County, supra,* 2 Cal.5th at p. 298, 212 Cal.Rptr.3d 107, 386 P.3d 773.) Whether such fee totals must be disclosed under the PRA depends on "whether those amounts reveal anything about **legal** consultation" or "communicate[ ] anything privileged" by providing insight into litigation strategy or **legal** consultation. (*Ibid.*) Thus, whether **disclosure** of fee totals in long-concluded litigation is privileged is a factual question for the trial court in the first instance. (See generally *Weingarten v. Superior Court* (2002) 102 Cal.App.4th 268, 277, fn. 1, 125 Cal.Rptr.2d 371; *Converse v. Fong* (1984) 159 Cal.App.3d 86, 93, 205 Cal.Rptr. 242.)

[4] The ACLU is incorrect, however, that the superior court must review other redacted portions of the **invoices** in concluded matters. *Los Angeles County*'s conclusion that information in **billing invoices** is sometimes subject to PRA **disclosure** appears to be limited to fee totals. *Los Angeles County* explained that whether the attorney-client privilege applies turns on whether amounts **billed** reveal anything about **legal** consultation. (*Los Angeles County, supra,* 2 Cal.5th at p. 298, 212 Cal.Rptr.3d 107, 386 P.3d 773.) Thus, **billing** entries or portions of **invoices** that ****681** "provide[ ] any insight into litigation strategy or **legal** consultation," reveal the substance ***1275** of **legal** consultation, or reveal "clues about **legal** strategy," are privileged. (*Id.* at pp. 297-298, 212 Cal.Rptr.3d 107, 386 P.3d 773.) The court explained, "[t]o the extent that **billing** information is conveyed 'for the purpose of ... **legal** representation'—perhaps to inform the client of the nature or amount of work occurring in connection with a pending **legal** issue—*such information lies in the heartland of the attorney-client privilege.*" (*Id.* at p. 297, 212 Cal.Rptr.3d 107, 386 P.3d 773, italics added.) **Billing** entries or portions of **invoices** that describe the work performed for a client therefore fall directly in the "heartland" protected by the privilege. As to such information, the *Los Angeles County* court does not appear to have differentiated between current and concluded matters. Instead, the court reasoned that such information is "conveyed 'for the purpose of ... **legal** representation.' " (*Ibid.*)

When discussing information that might be unprivileged after a matter concludes, *Los Angeles County* pointedly did *not* discuss **billing** entries or other aspects of an attorney's **invoice**. Instead, it expressly limited its analysis to "fee totals." (*Los Angeles County, supra,* 2 Cal.5th at pp. 298-300, 212 Cal.Rptr.3d 107, 386 P.3d 773.) The ACLU, of course, seeks information in the **invoices** precisely because it wishes to discern the County's **legal** strategy and uncover the nature of the work performed. Under *Los Angeles County,* these matters fall within the "heartland" of the privilege. (See *id.* at pp. 297-298, 212 Cal.Rptr.3d 107, 386 P.3d 773 [fee total information may become disclosable when it "no longer provides any insight into litigation strategy or **legal** consultation"].)

Other than fee totals, we can conceive of nothing likely to be contained in a typical **billing invoice** besides time entries, that is, information from the lawyer to the client regarding the amount and nature of work performed. According to *Los Angeles County,* information regarding such **billing** entries is within the scope of the privilege. (*Los Angeles County, supra,* 2 Cal.5th at p. 297, 212 Cal.Rptr.3d 107, 386 P.3d 773.)

[5] Moreover, there is a logical reason why *Los Angeles County* likely limited post-litigation **disclosure** to fee totals. A trial court generally may not require a litigant to disclose assertedly attorney-client privileged information in order to rule upon the claim of privilege. (*Costco, supra,* 47 Cal.4th at p. 736, 101 Cal.Rptr.3d 758, 219 P.3d 736; *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 911, 159 Cal.Rptr.3d 789 ["In general, the court cannot require **disclosure** for in camera review of materials assertedly protected by attorney-client privilege"].) As *Costco* explained: "Evidence Code section 915 provides, with exceptions not applicable here, that 'the presiding officer may not require **disclosure** of information claimed to be privileged under this division ... in order to rule on the claim of privilege....' [Citation.] Section 915 also prohibits **disclosure** of information claimed to be privileged work product under Code of Civil Procedure section 2018.030, subdivision (b), but, as to the work

product privilege, if the court is unable to rule on the claim of *1276 privilege 'without requiring **disclosure** of the information claimed to be privileged, the court may require the person from whom **disclosure** is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present.' [Citation.] No comparable provision **682 permits in camera **disclosure** of information alleged to be protected by the attorney-client privilege." (*Costco, supra,* 47 Cal.4th at p. 736, 101 Cal.Rptr.3d 758, 219 P.3d 736, fn. omitted.)

[6] Consequently, and contrary to the ACLU's demands, a trial court faced with a claim that information contained in **invoices** is protected by the attorney-client privilege is not permitted, absent the consent of the party asserting the privilege, to examine the **invoices** to determine whether specific **billing** entries reveal anything about **legal** consultation or provide insight into litigation strategy. (See *Costco, supra,* 47 Cal.4th at pp. 737, 740, 101 Cal.Rptr.3d 758, 219 P.3d 736; *Los Angeles County, supra,* 2 Cal.5th at p. 298, 212 Cal.Rptr.3d 107, 386 P.3d 773 [information that reveals the substance of **legal** consultation or **legal** strategy is privileged].) Evidence Code section 915 thus would hamstring a trial court's efforts to determine whether specific **invoice** entries are privileged. On the other hand, a court is more likely to be able to rule on whether fee totals are privileged in light of the passage of time even absent examination of the particular **invoices** in question. Therefore, to the extent the trial court ordered portions of **invoices** other than fee totals disclosed, it erred. [1]

DISPOSITION

The petition is granted. The superior court is directed to vacate its order compelling the County to disclose records requested in the ACLU's July 1, 2013 PRA request. The court is directed to conduct a hearing to determine *1277 whether fee totals in any concluded matter should be disclosed. The parties are to bear their own costs of this writ proceeding. (Cal. Rules of Court, rule 8.493(a)(1)(B).)

We concur:

EDMON, P.J.

JOHNSON (MICHAEL), J. *

All Citations

12 Cal.App.5th 1264, 219 Cal.Rptr.3d 674, 17 Cal. Daily Op. Serv. 6051, 2017 Daily Journal D.A.R. 6051

Footnotes

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 As was true in our prior opinion, we need not reach two additional contentions the parties raised in their earlier briefing. The County argued that **invoices** related to *pending* matters were exempt from PRA **disclosure** because they fell within the PRA's "catchall" exemption (Gov. Code, § 6255, subd. (a)). In light of our Supreme Court's ruling that the attorney-client privilege encompasses all content in **invoices** related to active matters (*Los Angeles County, supra,* 2 Cal.5th at pp. 297, 300, 212 Cal.Rptr.3d 107, 386 P.3d 773), we need not address application of the catchall exemption.
Second, the parties disagreed about whether Business and Professions Code sections 6148 and 6149 supported a conclusion that the information contained in **invoices** was privileged under Evidence Code section 952. *Los Angeles County* briefly addressed application of Business and Professions Code sections 6148 and 6149 and concluded these provisions supported its conclusion that **invoices** are not categorically privileged. The court explained that because the Legislature defined fee agreements and **billing** statements in one statutory section, but made only fee agreements expressly subject to the attorney-client privilege, the privilege "was not intended to protect both fee agreements and **invoices** in the exact same way." (*Los Angeles County, supra,* 2 Cal.5th at p. 299, 212 Cal.Rptr.3d 107, 386 P.3d 773.) The Supreme Court's reasoning makes it unnecessary for us to address this question, and the parties do not raise it in their briefs after remand.

KeyCite Yellow Flag - Negative Treatment
Distinguished by State ex rel. Pietrangelo v. Avon Lake, Ohio, May 17, 2016

134 Ohio St.3d 120
Supreme Court of Ohio.

The STATE ex rel. ANDERSON, Appellant,
v.
The CITY OF VERMILION, Appellee.

No. 2012–0943.

Submitted Nov. 14, 2012.

Decided Nov. 21, 2012.

Synopsis
Background: Records requestor sought writ of mandamus to compel city to provide copies of certain itemized billing statements for attorney services rendered to the city. The Court of Appeals, Erie County, No. E–10–040, 2012 WL 1493744, denied request. Requestor appealed.

Holdings: The Supreme Court held that:

[1] requestor did not waive her mandamus claim or appeal by seeking and receiving summaries of information requested from city;

[2] city's belief that non-exempt portions of requested records would be "meaningless" without portions covered by attorney-client privilege and thus exempt from disclosure was not appropriate basis for refusal to provide non-exempt portions; and

[3] city was required to disclose non-exempt portion of records.

Affirmed in part, reversed in part, and remanded.

West Headnotes (11)

[1] Appeal and Error
⇐ De novo review

In reviewing whether the trial court's granting of summary judgment was proper, appellate court applies a de novo review. Rules Civ.Proc., Rule 56(C).

4 Cases that cite this headnote

[2] Mandamus
⇐ Public records

Mandamus is the appropriate remedy to compel compliance with the state's Public Records Act. R.C. § 149.43.

Cases that cite this headnote

[3] Records
⇐ In general;freedom of information laws in general

Records
⇐ Matters Subject to Disclosure; Exemptions

Court construes the Public Records Act liberally in favor of broad access and resolve any doubt in favor of disclosure of public records. R.C. § 149.43.

Cases that cite this headnote

[4] Records
⇐ Matters Subject to Disclosure; Exemptions

Records
⇐ Evidence and burden of proof

Exceptions to disclosure under the Public Records Act are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception. R.C. § 149.43.

2 Cases that cite this headnote

[5] Records
⇐ Exemptions or prohibitions under other laws

The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to

the attorneys' legal advice, is a state law prohibiting release of those records pursuant to the Public Records Act. R.C. § 149.43(A)(1)(v).

1 Cases that cite this headnote

[6] **Records**
⇐ In camera inspection;excision or deletion

The nonexempt portions of the records submitted under seal in public-records mandamus cases must be disclosed. R.C. § 149.43(B)(1).

2 Cases that cite this headnote

[7] **Mandamus**
⇐ Mandamus Ineffectual or Not Beneficial

Providing the requested records to a relator generally renders moot a public-records mandamus claim under the Public Records Act. R.C. § 149.43.

2 Cases that cite this headnote

[8] **Mandamus**
⇐ Parties entitled to allege error

Records requestor did not waive her mandamus claim or appeal by seeking and receiving certain summaries of information requested from city, after city declined to provide records requested and Court of Appeals ruled against requestor on claim against city, where summaries provided were for different period of time than for that originally requested. R.C. § 149.43.

Cases that cite this headnote

[9] **Records**
⇐ Internal memoranda or letters;executive privilege

City's belief that non-exempt portions of requested records would be "meaningless" without portions covered by attorney-client privilege and thus exempt from disclosure was not appropriate basis for refusal to provide non-exempt portions, in case in which requestor sought attorney-billing statements for services rendered to city and narrative portions of statements were found to be exempt from disclosure; there was no indication that city's subjective belief concerning value of information was true, since provision of information concerning hours expended and rate charged could have had some value to requestor. R.C. § 149.43(B)(1).

1 Cases that cite this headnote

[10] **Records**
⇐ In camera inspection;excision or deletion

Under the Public Records Act, city was required to disclose non-exempt portion of records consisting of attorney-billing statements, where city did not provide records requestor with any alternate records containing the non-exempt information. R.C. § 149.43(B)(1).

2 Cases that cite this headnote

[11] **Records**
⇐ Costs and fees

Court of Appeals acted within its discretion in denying records requestor's application for statutory damages and attorney fees, in claim against city under the Public Records Act, even though reviewing court later determined that city improperly withheld non-exempt portions of records; large part of requested statements were exempt from disclosure, and a well-informed public office could have reasonably believed that nonexempt portions of records could be withheld. R.C. § 149.43(C)(1, 2).

1 Cases that cite this headnote

Attorneys and Law Firms

****977** Seeley, Savidge, Ebert & Gourash Co., L.P.A., and Andrew D. Bemer, Cleveland, for appellant.

Weston Hurd, L.L.P., Shawn W. Maestle, and Timothy R. Obringer, Cleveland, for appellee.

Opinion

PER CURIAM.

***121** {¶ 1} Appellant, Jean A. Anderson, appeals from a judgment denying her request for a writ of mandamus to compel appellee, the city of Vermilion, Ohio, to provide copies of certain itemized billing statements for attorney services rendered to the city. Because the city did not establish that the entirety of the requested statements are exempt from disclosure under the Public Records Act, we reverse that portion of the judgment of the court of appeals and remand the cause for further proceedings. We affirm the portion of the judgment denying Anderson's request for an award of statutory damages and attorney fees.

Facts

{¶ 2} Anderson served as the mayor of Vermilion from January 2006 through December 2009. During her administration, the law firm of Marcie & Butler, L.P.A. ("Marcie & Butler") provided legal services to the city, and the firm's provision of services extended into the next mayor's term. The new mayor, Eileen Bulan, appointed Kenneth Stumphauzer as the city's director of law. Stumphauzer's law firm, Stumphauzer, O'Toole, McLaughlin, McGlamery & Loughman Co., L.P.A. ("Stumphauzer & O'Toole"), billed the city over $27,000 for legal services provided during the first six weeks of the new mayor's administration.

{¶ 3} Because she thought that the annual legal fees expended by the new administration would far exceed the fees incurred during her administration, Anderson made several records requests to permit public scrutiny of the city's expenditure of funds for legal services. On May 25, 2010, Anderson personally delivered a written public-records request to the city's finance director for copies of certain records, including "all itemized billing statements received from Kenneth Stumphauzer, Stumphauzer & O'Toole, [and] Marcie & Butler, for January, February, March and April 2010."

{¶ 4} The city acknowledged its receipt of Anderson's request but denied it on the basis that the requested legal bills are exempted from disclosure by the attorney-client privilege:

> [T]he detailed billing statements, describing the specific work performed for and advice rendered to the City by Stumphauzer O'Toole and any other lawyers rendering services to the City are covered by ****978** the attorney-client ***122** privilege. In particular, bills submitted by Stumphauzer O'Toole to the City describe each matter with respect to which legal services were rendered, the dates on which such legal services were rendered and the specific tasks performed. As a result, we cannot agree to provide you with those detailed itemized billing statements.

{¶ 5} In September 2010, Anderson filed a petition in the court of appeals. Anderson sought a writ of mandamus to compel Vermilion to provide copies of the nonexempt portions of the requested itemized attorney-billing statements. Anderson also requested an award of statutory damages and attorney fees. The court granted an alternative writ, and the city submitted an answer to the petition. Anderson filed a motion for summary judgment, and the city filed a brief in opposition. The court of appeals granted Anderson's motion for an in camera review of the requested attorney-billing statements, and the city filed the statements under seal.

{¶ 6} On April 25, 2012, the court of appeals denied Anderson's motion for summary judgment, granted summary judgment in favor of Vermilion, and denied the writ.

{¶ 7} This cause is now before the court on Anderson's appeal as of right.

Analysis

Summary Judgment

{¶ 8} The court of appeals denied Anderson's motion for summary judgment and, in essence, granted summary judgment in favor of Vermilion by determining that "there remains no genuine issue of material fact and [the city] is entitled to judgment as a matter of law." 6th Dist. No. E–10–040, 2012-Ohio-1868, 2012 WL 1493744, ¶ 13. *See also Todd Dev. Co., Inc. v. Morgan,* 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶ 17 ("When a party moves for summary judgment, the nonmovant has an opportunity to respond, and the court has considered all the relevant evidence, the court may enter summary judgment against the moving party, despite the nonmoving party's failure to file its own motion for summary judgment").

[1] {¶ 9} "Summary judgment is appropriate when an examination of all relevant materials filed in the action reveals that 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Smith v. McBride,* 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12, quoting Civ.R. 56(C). "In reviewing whether the trial court's granting of summary judgment was proper, we apply a de novo review." *Troyer v. Janis,* 132 Ohio St.3d 229, 2012-Ohio-2406, 971 N.E.2d 862, ¶ 6.

***123** *Mandamus*

[2] **[3]** {¶ 10} The court of appeals entered summary judgment in favor of Vermilion on Anderson's mandamus claim for itemized attorney-billing statements. "Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act." *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,* 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6. "We construe the Public Records Act liberally in favor of broad access and resolve any doubt in favor of disclosure of public records." *State ex rel. Rocker v. Guernsey Cty. Sheriff's Office,* 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327, ¶ 6.

****979** **[4]** {¶ 11} Vermilion claims—and the court of appeals found—that the requested itemized attorney-billing statements are exempt from disclosure based on the attorney-client privilege. "Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception." *State ex rel. Cincinnati Enquirer v. Jones–Kelley,* 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus.

Attorney–Client Privilege

[5] {¶ 12} R.C. 149.43(A)(1)(v) excludes "[r]ecords the release of which is prohibited by state or federal law" from the definition of "public record" for purposes of the Public Records Act. "The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys' legal advice, is a state law prohibiting release of [those] records." *State ex rel. Besser v. Ohio State Univ.,* 87 Ohio St.3d 535, 542, 721 N.E.2d 1044 (2000).

{¶ 13} More specifically, we have held that the narrative portions of itemized attorney-billing statements containing descriptions of legal services performed by counsel for a client are protected by the attorney-client privilege. *State ex rel. Dawson v. Bloom–Carroll Local School Dist.,* 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 28–29; *see also State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office,* 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 36.

{¶ 14} Anderson requested itemized attorney-billing statements for services provided to Vermilion by Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler for January, February, March, and April 2010. The Stumphauzer & O'Toole billing statements include the title of the matter being handled, e.g., the case name or general subject, a narrative description of the legal services provided, the hours expended, and the amount due. The Marcie & Butler statements include the dates the services were rendered, a narrative description ***124** of the services rendered, the hours and fee rate for the services provided, and the amount of money billed.

{¶ 15} Under the Public Records Act, insofar as these itemized attorney-billing statements contain nonexempt information, e.g., the general title of the matter being handled, the dates the services were performed, and the hours, rate, and money charged for the services, they should have been disclosed to Anderson. "If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public

record shall make available all of the information within the public record that is not exempt." R.C. 149.43(B)(1).

[6] {¶ 16} The parties submitted the requested attorney-billing statements under seal for the court of appeals' review. As we have held, the nonexempt portions of the records submitted under seal in public-records mandamus cases must be disclosed:

> "[W]hen a governmental body asserts that public records are excepted from disclosure and such assertion is challenged, the court must make an individualized scrutiny of the records in question. *If the court finds that these records contain excepted information, this information must be redacted and any remaining information must be released.*"

**980 (Emphasis added.) *State ex rel. Master v. Cleveland,* 75 Ohio St.3d 23, 31, 661 N.E.2d 180 (1996), quoting *State ex rel. Natl. Broadcasting Co., Inc. v. Cleveland,* 38 Ohio St.3d 79, 526 N.E.2d 786 (1988), paragraph four of the syllabus.

{¶ 17} Consequently, in *McCaffrey,* 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, at ¶ 35–37, we held that the respondents in a public-records mandamus case had complied with a records request by providing copies of civil-case logs that had been redacted to exclude the narrative portions of the logs that were covered by attorney-client privilege.

[7] [8] {¶ 18} The city nevertheless makes three separate arguments to support the court of appeals' conclusion. Vermilion first claims that Anderson waived her right to the nonexempt portions of the requested attorney-billing statements because after the court of appeals' judgment, she requested summaries of the information in attorney bills excluding attorney-client information and the city satisfied that request. It is true that providing the requested records to a relator generally renders moot a public-records mandamus claim. *See State ex rel. Striker v. Smith,* 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 22. But Anderson's postjudgment records request was for records for a different period of time—June 2010 through May 2012—than the period at issue in this case —January through April 2010. Therefore, Anderson did not waive her mandamus *125 claim or appeal by seeking and receiving different records than those at issue in this case.

[9] {¶ 19} The city next claims that it need not provide copies of the nonexempt portions of the requested attorney-billing statements because after redacting the narrative portions that are covered by the attorney-client privilege, the remainder would be "meaningless." But there is no indication that the city's subjective belief concerning the value of this information is true. The provision of information concerning the hours expended and rate charged for attorney services may have some value to the requester. Nor is there any exception to the explicit duty in R.C. 149.43(B)(1) for public offices to make available all information that is not exempt after redacting the information that is exempt.

[10] {¶ 20} Finally, the city contends that the statements were either exempt from disclosure under the attorney-client privilege or so inextricably intertwined so as to also be privileged. The court of appeals agreed with that assertion based on our decision in *Dawson,* 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, where we noted that attorney-billing statements withheld by a school district were "either covered by the attorney-client privilege or so inextricably intertwined with the privileged materials as to also be exempt from disclosure." *Id.* at ¶ 29.

{¶ 21} Nevertheless, in the very same paragraph cited by the city and relied on by the court of appeals, we emphasized that the school district did not have to provide the nonexempt portions of the statements to the requester in that case because the district had already provided summaries containing the nonexempt information:

> Therefore, the school district properly responded to Dawson's request for itemized invoices of law firms providing legal services to the district in matters involving Dawson and her children by providing her with summaries of the invoices including the attorney's name, the fee total, and the general matter involved. No further access to

the ****981** detailed narratives contained in the itemized billing statements was warranted.

Id.

{¶ 22} In essence, the relator in *Dawson* was not entitled to the nonexempt portions of the requested itemized attorney-billing statements, because she had already been provided that information by the school district in the summaries. This rendered the relator's claim for that part of the records moot. *Striker*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, at ¶ 22.

***126** {¶ 23} This is the crucial fact that distinguishes this case from *Dawson*. Vermilion did not provide Anderson with alternate records that contain the nonexempt information from the requested attorney-billing statements for January 2010 through April 2010. Therefore, her claim for these records is not moot, and she is entitled to that portion of the statements after they have been redacted to prevent disclosure of the narrative portions that are covered by the attorney-client privilege. R.C. 149.43(B)(1); *Natl. Broadcasting Co.*, 38 Ohio St.3d 79, 526 N.E.2d 786, at paragraph four of the syllabus. By concluding otherwise, the court of appeals erred.

{¶ 24} Therefore, the court of appeals erred in denying Anderson's motion for summary judgment and granting summary judgment in favor of the city on Anderson's public-records mandamus claim. Anderson established her entitlement to a writ of mandamus to compel Vermilion to provide her with copies of the nonexempt portions of the requested itemized attorney-billing statements.

Statutory Damages and Attorney Fees

[11] {¶ 25} Anderson claims that the court of appeals also erred in denying her request for statutory damages and attorney fees. In assessing this claim, we review whether the court of appeals abused its discretion in denying the request. *State ex rel. Patton v. Rhodes*, 129 Ohio St.3d 182, 2011-Ohio-3093, 950 N.E.2d 965, ¶ 12.

{¶ 26} The court of appeals did not abuse its discretion in denying Anderson's request, because a large part of the requested statements are exempt from disclosure. *See State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, 940 N.E.2d 1280, ¶ 64 (denying request for statutory damages and attorney fees for reasons including that most of the public-records claims lacked merit). In addition, a well-informed public office could have reasonably believed, based on our decision in *Dawson*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, at ¶ 29, that the nonexempt portions of the attorney-billing statements could be withheld from disclosure. *See* R.C. 149.43(C)(1) and (2); *see also State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶ 37 and 40.

Conclusion

{¶ 27} Based on the foregoing, the court of appeals erred in granting summary judgment in favor of the city and denying Anderson's claim for a writ of mandamus. We reverse that portion of the judgment of the court of appeals and remand the cause for further proceedings consistent with this opinion. We ***127** affirm the portion of the judgment denying Anderson's request for statutory damages and attorney fees.

Judgment accordingly.

O'CONNOR, C.J., and PFEIFER, LUNDBERG STRATTON, O'DONNELL, LANZINGER, CUPP, and McGEE BROWN, JJ., concur.

All Citations

134 Ohio St.3d 120, 980 N.E.2d 975, 2012 -Ohio- 5320

End of Document

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta State ex rel. DiFranco v. S. Euclid, Ohio, February 19, 2014

131 Ohio St.3d 10
Supreme Court of Ohio.

The STATE ex rel. DAWSON
v.
BLOOM–CARROLL LOCAL SCHOOL DISTRICT.

No. 2011–0145.

Submitted Oct. 4, 2011.

Decided Nov. 29, 2011.

Synopsis
Background: Petitioner sought writ of mandamus to compel school district to disclose records.

Holdings: Following grant of alternative writ and submission of additional evidence and briefs, the Supreme Court held that:

[1] petitioner was not entitled to submit additional evidence instanter;

[2] school district was not required to provide itemized attorney-fee billing statements in response to record request;

[3] school district was not required to provide letter from its insurance company to school district identifying school district's attorney in petitioner's due process lawsuit in response to record request; and

[4] school district did not waive any privilege applicable to letter from insurance company.

Writ denied.

Pfeifer, J., concurred in judgment only.

West Headnotes (8)

[1] **Mandamus**
Admissibility of evidence

Admission or exclusion of relevant evidence in mandamus proceedings is within the court's sound discretion.

Cases that cite this headnote

[2] **Mandamus**
Admissibility of evidence

Petitioner was not entitled to submit additional evidence instanter, in proceedings for writ of mandamus to compel school district to disclose records, where purported affidavit sought to be admitted was unsigned, and petitioner did not submit credible evidence that she could not have copy of audiotape sought to be admitted prior to deadline for submission of evidence.

1 Cases that cite this headnote

[3] **Affidavits**
Signature and oath

Unsigned affidavits have no evidentiary value.

1 Cases that cite this headnote

[4] **Mandamus**
Admissibility of evidence

School district was entitled to strike affidavit submitted as its rebuttal evidence in proceedings on petition for writ of mandamus, and to substitute amended affidavit containing correction, where correction sought was appropriate.

2 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**
Nature of privilege

Attorney-client privilege is governed both by statute, which provides a testimonial privilege, and by common law, which broadly protects against any dissemination of information obtained in the confidential attorney-client relationship. R.C. § 2317.02(A).

12 Cases that cite this headnote

[6] **Records**
Internal memoranda or letters;executive privilege

School district was not required to provide itemized attorney-fee billing statements in response to public records request, and its provision of summaries of invoices, including attorney's name, fee total, and general matter involved, was sufficient, where statements were either themselves covered by attorney-client privilege or so inextricably intertwined with privileged materials as to also be exempt from disclosure; billing statements at issue contained detailed descriptions of work performed by school district's attorneys, statements concerning their communications to each other and insurance counsel, and issues they researched. R.C. § 2317.02(A).

12 Cases that cite this headnote

[7] **Records**
Internal memoranda or letters;executive privilege

School district was not required to provide letter from its insurance company to school district identifying school district's attorney in requester's due process lawsuit, in response to public records request, as insurance company was effectively standing in shoes of school district, and letter was thus protected by attorney-client privilege; letter, addressed to district and copied to insurance counsel who would represent district, evaluated due process claim and extent to which it might be covered by district's insurance policy, and instructed district to cooperate with insurance company and attorney selected by it to represent district to preserve its insurance coverage.

2 Cases that cite this headnote

[8] **Records**
Internal memoranda or letters;executive privilege

School district did not waive any privilege applicable to letter from its insurance company to school district identifying school district's attorney in requester's due process lawsuit, for purposes of public records request; although letter was referred to at a meeting, contents thereof were not disclosed at a public meeting.

3 Cases that cite this headnote

Attorneys and Law Firms

**525 Stein, Chapin & Associates, L.L.C., Beth J. Nacht, and Lance Chapin, Columbus, for relator.

**526 Cooper, Gentile, Washington & Meyer Co., L.P.A., Janet K. Cooper, and Beverly A. Meyer, Dayton, for respondent.

Opinion

PER CURIAM.

*11 {¶ 1} Relator, Angela Dawson, requests a writ of mandamus to compel respondent, Bloom–Carroll Local School District, to provide her with access to (1) itemized invoices of law firms providing services to the district in matters pertaining to Dawson and her children and (2) communications from the school district's insurance carrier identifying attorney Janet Cooper as the district's legal representative and describing the liability and exposure of the district and insurance company related to a case filed against the district by Dawson on behalf of one of her children. Because the requested records are exempt from disclosure under the Public Records Act, R.C. 149.43, we deny the writ.

Facts

{¶ 2} In March 2010, Dawson sent an e-mail request to Travis Bigam, the treasurer of the Bloom–Carroll Local School District, for certain records, including "copies of any and all invoices received from any and all law firm(s) providing services relating to any matters pertaining to [herself] and/or either of [her] children." The school district provided Dawson with summaries of the invoices noting the attorney's name, the invoice total, and the matter involved. The district did not, however, provide Dawson with the requested itemized invoices, because they contained what it considered to be confidential information, stating, "These itemized monthly statements contain descriptions of the work performed by the attorneys of Bricker and Eckler, L.L.P. and include: statements regarding their communications to each other and insurance counsel, Janet Cooper; the areas and issues the attorneys researched; and the legal issues upon which they focused their attention."

{¶ 3} By e-mail request in April 2010, Dawson advised the school district that she still wanted copies of the itemized statements for each invoice regarding the legal fees spent by the district on matters relating to her and her children. On December 20, 2010, Dawson hand-delivered a written request for the itemized invoices. The district denied the request on the basis that the invoices contained confidential communications between the district and its attorneys. The district later refused Dawson's request that it provide her with redacted copies of the invoices.

{¶ 4} On December 13, 2010, Dawson hand-delivered a request to the district's treasurer for "any and all communication(s) from the District's insurance carrier, Ohio Casualty Insurance, appointing Janet Cooper as the District's legal representative, as well as describing the liability and exposure of both the District and ***12** Ohio Casualty related to the last due process [lawsuit] filed against the District on behalf of Douglas Dawson." On December 22, 2010, the school district denied Dawson's request after informing her that it had one responsive document dated February 9, 2010. The treasurer's response stated that the letter that the district refused to produce "was authored by the School District insurer's claims analyst and was sent to the District, the Insurer's and District's local representative, and the attorney appointed by the insurer, Janet Cooper."

{¶ 5} On January 25, 2011, Dawson filed this action for a writ of mandamus to compel the school district to provide her with access to the requested records. Dawson also requested an award of attorney fees and statutory damages. The school district filed an answer and a motion for judgment on the pleadings, and ****527** Dawson filed a memorandum in opposition to the motion.

{¶ 6} Following the return of the case to the docket after unsuccessful mediation, we granted an alternative writ and ordered the submission of evidence and briefs. 128 Ohio St.3d 1480, 2011-Ohio-2055, 946 N.E.2d 239. We ordered the school district to submit as part of its evidence for in camera review unredacted copies of the records that it claims to be exempt from disclosure. Id. Under the court order, the parties' evidence was due on May 24.

{¶ 7} Dawson filed her evidence on the May 24 due date, and after receiving a one-day extension, the school district submitted its evidence on May 25. In her evidentiary submission, Dawson included an affidavit that stated:

{¶ 8} "I, Angela Dawson, being duly sworn and cautioned, and assuring my competency to testify to the matters stated herein based on personal knowledge, state as follows:

{¶ 9} " * * *

{¶ 10} "10. Respondent voluntarily disclosed the February 9, 2010 document to the District's board members and openly discussed the document in a public board meeting.

{¶ 11} "11. Respondent voluntarily disclosed the February 9, 2010 document to Charlie Black, a member of the public and former school board member."

{¶ 12} In her merit brief, Dawson claimed that this evidence established that any exemption claimed by the school district regarding the February 9, 2010 letter from its insurer's claims analyst was waived by its voluntary disclosure of the letter to the public. In its brief, the school district claimed that were it given the opportunity to submit additional evidence, it would rebut Dawson's evidence.

{¶ 13} On July 20, 2011, we ordered that the school district may file rebuttal evidence to paragraphs 10 and 11 of Dawson's affidavit. 129 Ohio St.3d 1418, 2011-Ohio-3558, 950 N.E.2d 565. On August 9, the school district filed its rebuttal evidence. The rebuttal evidence consisted of two affidavits, one from the ***13** school district treasurer, Bigam, and one from former school district board of education member Charles E. Black Jr.

{¶ 14} In his affidavit, Bigam stated that on February 9, 2010, the school district received a letter from its insurance carrier that had also been sent to its legal counsel, Janet Cooper, that he shared this letter and its contents with the board of education during its confidential executive session on February 15, 2010, and, in a statement later recanted, that the letter "was not referenced after the School Board returned from executive session to its public meeting that date." Bigam further stated that although the contents of the February 9, 2010 letter were discussed in the board's executive session on February 15, 2010, they were never disclosed or discussed in the board's public meetings. Bigam stores the letter in a secure place in his office and has not shown the letter to former board member Black.

{¶ 15} In his affidavit, former board member Black stated that no one from the school district or its board of education had ever shown him or told him about the February 9, 2010 letter and that he had no knowledge about it.

{¶ 16} This cause is now before us on the merits as well as on additional motions filed by the parties.

Legal Analysis

Motions

{¶ 17} On August 11, Dawson filed a motion to submit additional evidence instanter. ****528** The evidence sought to be introduced is an additional affidavit of Dawson in which she states that she met with Bloom–Carroll Local School District Board of Education member Ronald Rae Fowler and that he provided to her a copy of a sworn statement and documents he had provided to the school district related to the February 9, 2010 insurance letter that is requested by Dawson in this case. She also seeks to submit an audio recording of the board's February 14, 2011 meeting, which she claims she received sometime after February 14, 2011.

[1] {¶ 18} The admission or exclusion of relevant evidence is within the court's sound discretion. See generally *State ex rel. Gilbert v. Cincinnati,* 125 Ohio St.3d 385, 2010-Ohio-1473, 928 N.E.2d 706, ¶ 35. Dawson claims that the evidence that she requests to submit is newly discovered and was not previously available to her at the time she submitted her evidence on May 24, 2011. It is true that "in mandamus actions, a court is not limited to considering facts and circumstances at the time a proceeding is instituted but should consider the facts and conditions at the time it determines whether to issue a peremptory writ." *State ex rel. Portage Lakes Edn. Assn., OEA/NEA v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839, 769 N.E.2d 853, ¶ 54.

[2] ***14** {¶ 19} For the following reasons, however, we deny Dawson's motion.

[3] {¶ 20} First, the purported affidavit of school board member Fowler is not signed. "Affidavits filed in original actions in this court should be based on personal knowledge, setting forth facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated therein." *State ex rel. Nix v. Cleveland* (1998), 83 Ohio St.3d 379, 384, 700 N.E.2d 12; S.Ct.Prac.R. 10.7. Unsigned affidavits have no evidentiary value. See generally *Morrison v. Kemper Ins. Co.*, Cuyahoga App. No. 82568, 2003-Ohio-5655, 2003 WL 22413651, ¶ 6; *Graves v. Van Buskirk* (Feb. 20, 1991), Summit App. No. 14785, 1991 WL 21545, *2 ("The unsigned affidavit submitted * * * is not a certified sworn statement and does not constitute a valid form of testimony").

{¶ 21} Second, Dawson has not submitted credible evidence that she could not have submitted a copy of the audiotape recording of the board's February 14, 2011 meeting by the May 24 deadline for her evidence. Moreover, even if she had, a review of the recording discloses just what the school district claims—that although the February 9, 2010 insurance letter was referred to at the public portion of a meeting, the specific contents of the letter have never been disclosed at a public meeting.

{¶ 22} Based on the foregoing, we deny Dawson's motion to submit additional evidence instanter.

[4] {¶ 23} We also grant the school district's motion to strike an incorrect statement in the rebuttal evidence it filed. The school district asserts that after Bigam provided the affidavit in which he stated that the February 9, 2010 insurance letter and its contents were never mentioned in a public meeting of the board of education, he recalled that the letter was mentioned in a public meeting but that the specific contents of the letter were not discussed. The school district seeks to strike the previous affidavit submitted as its rebuttal evidence and to substitute an amended affidavit of Bigam that contains the correction. Because the correction is appropriate, we grant the motion. See *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland,* 114 Ohio St.3d 183, 2007-Ohio-3831, 870 N.E.2d 1174, ¶ 37 (determination of motion to ****529** strike is within the court's broad discretion).

Mandamus

{¶ 24} "Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act." *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,* 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6; R.C. 149.43(C)(1). "We construe the Public Records Act liberally in favor of broad access and resolve any doubt in favor of ***15** disclosure of public records." *State ex rel. Rocker v. Guernsey Cty. Sheriff's Office,* 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327, ¶ 6.

{¶ 25} "Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception." *State ex rel. Cincinnati Enquirer v. Jones–Kelley,* 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus.

Attorney–Client Privilege

{¶ 26} The school district asserts that the requested records are exempt from disclosure because of the attorney-client privilege and the trial-preparation-record exception. "The attorney-client privilege is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States* (1998), 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379. "The privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.' " Id. at 403, 118 S.Ct. 2081, 141 L.Ed.2d 379, quoting *Upjohn Co. v. United States* (1981), 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584. "In the modern law, the privilege is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 660, 635 N.E.2d 331.

[5] {¶ 27} R.C. 149.43(A)(1)(v) exempts "[r]ecords the release of which is prohibited by state or federal law" from the definition of "public record." "The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys' legal advice, is a state law prohibiting release of those records." *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535, 542, 721 N.E.2d 1044. In Ohio, the attorney-client privilege is governed both by statute, R.C. 2317.02(A), which provides a testimonial privilege, and by common law, which broadly protects against any dissemination of information obtained in the confidential attorney-client relationship. *State ex rel. Toledo Blade Co. v. Toledo–Lucas Cty. Port Auth.,* 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 24.

[6] {¶ 28} For the itemized attorney-fee bills, the school district "had no duty to provide access to records related to attorney fees that * * * were covered by the attorney-client privilege." *State ex rel. Taxpayers Coalition v. Lakewood* (1999), 86 Ohio St.3d 385, 392, 715 N.E.2d 179. "While a simple invoice ordinarily is not privileged, itemized legal bills necessarily reveal confidential information and thus fall within the [attorney-client] privilege." *Hewes v. Langston* (Miss.2003), 853 So.2d 1237, ¶ 45. As a federal appellate court observed, "billing records describing the services performed for [the attorney's] clients and the time spent on those ****530** ***16** services, and any other attorney-client correspondence * * * may reveal the client's motivation

for seeking legal representation, the nature of the services provided or contemplated, strategies to be employed in the event of litigation, and other confidential information exchanged during the course of the representation. * * * [A] demand for such documents constitutes 'an unjustified intrusion into the attorney-client relationship.' " *In re Horn* (C.A.9, 1992), 976 F.2d 1314, 1317–1318, quoting *In re Grand Jury Witness (Salas)* (C.A.9, 1982), 695 F.2d 359, 362. To the extent that narrative portions of attorney-fee statements are "descriptions of legal services performed by counsel for a client," they are protected by the attorney-client privilege because they "represent communications from the attorney to the client about matters for which the attorney has been retained by the client." *State ex rel. Alley v. Couchois* (Sept. 20, 1995), Miami App. No. 94–CA–30, 1995 WL 559973, *4.

{¶ 29} The school district refused to make the requested itemized attorney-billing statements available to Dawson because the statements contained detailed descriptions of work performed by the district's attorneys, statements concerning their communications to each other and insurance counsel, and the issues they researched. The withheld records are either covered by the attorney-client privilege or so inextricably intertwined with the privileged materials as to also be exempt from disclosure. Therefore, the school district properly responded to Dawson's request for itemized invoices of law firms providing legal services to the district in matters involving Dawson and her children by providing her with summaries of the invoices including the attorney's name, the fee total, and the general matter involved. No further access to the detailed narratives contained in the itemized billing statements was warranted.

[7] {¶ 30} The February 9, 2010 letter from the school district's insurance company to the district identifying Janet Cooper as the district's attorney in Dawson's due-process lawsuit against the district is also protected by the attorney-client privilege. The letter, which was addressed to the district and copied to the insurance counsel who would represent the district, evaluates Dawson's claim and the extent to which the claim might be covered by the district's insurance policy and instructs the district to cooperate with the insurance company and the attorney selected by the company to represent the school district to preserve its insurance coverage. In effect, the insurance company stands in the shoes of the district, and its letter naming Cooper as the district's attorney in Dawson's due-process lawsuit is covered by the attorney-client privilege. "Where a person approaches an attorney with the view of retaining his services to act on the former's behalf, an attorney-client relationship is created, and communications made to such attorney during the preliminary conferences prior to the actual acceptance or rejection by the attorney of the employment are privileged communications." *17 *Taylor v. Sheldon* (1961), 172 Ohio St. 118, 15 O.O.2d 206, 173 N.E.2d 892, paragraph one of the syllabus; see also *In re Klemann* (1936), 132 Ohio St. 187, 7 O.O. 273, 5 N.E.2d 492, paragraph one of the syllabus ("Where an insurer receives a report from its insured concerning a casualty covered by its policy of insurance, such report becomes the property of the insurer and subject to its complete control; and, when the insurer transmits it to its counsel for the purpose of preparing a defense against a possible law suit growing out of such casualty, such report constitutes a communication from client to attorney and **531 is privileged against production and disclosure * * * ").

[8] {¶ 31} Dawson claims that any privilege applicable to the insurance letter has been waived by the school district because the board of education voluntarily disclosed the letter to the public at a board meeting and also disclosed the letter to a former board member. "Voluntarily disclosing the requested record can waive any right to claim an exemption from disclosure" under the Public Records Act. *State ex rel. Cincinnati Enquirer v. Dupuis,* 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 22; *State ex rel. Zuern v. Leis* (1990), 56 Ohio St.3d 20, 22, 564 N.E.2d 81.

{¶ 32} Dawson's evidence of waiver, however, has been successfully refuted by the school district's evidence, which establishes that although the board of education referred to the insurance letter at a meeting, it never disclosed the contents of the letter at a public meeting. Moreover, the school district submitted an affidavit of the former school board member to whom Dawson had claimed the district had voluntarily disclosed the letter in which he denied ever being shown the letter.

{¶ 33} Therefore, the school district also properly denied Dawson's claim for the insurance letter appointing Cooper as the district's attorney in the case filed by Dawson on behalf of one of her children.

Attorney Fees and Statutory Damages

{¶ 34} Finally, because Dawson's public-records claims lack merit and were primarily beneficial to her rather than the public in general, she is not entitled to an award of attorney fees or statutory damages. See generally *State ex rel. Mahajan v. State Med. Bd. of Ohio,* 127 Ohio St.3d 497, 2010-Ohio-5995, 940 N.E.2d 1280, ¶ 60.

Conclusion

{¶ 35} Based on the foregoing, Dawson has not established her entitlement to the requested extraordinary relief in mandamus. While the Public Records Act "serves a laudable purpose by ensuring that governmental functions are not conducted behind a shroud of secrecy," "even in a society where an open government is considered essential to maintaining a properly functioning democracy, not every iota of information is subject to public scrutiny" and "[c]ertain ***18** safeguards are necessary." *State ex rel. Wallace v. State Med. Bd. of Ohio* (2000), 89 Ohio St.3d 431, 438, 732 N.E.2d 960. "The General Assembly has provided these safeguards by balancing competing concerns and providing for certain exemptions from the release of public records pursuant to R.C. 149.43." *Mahajan* at ¶ 66.

{¶ 36} The school district has met its burden of establishing the applicability of the attorney-client privilege to the records requested by Dawson. Therefore, we deny the writ and Dawson's request for attorney fees and statutory damages. By so holding, we need not address the school district's additional claim that the requested records are excepted from disclosure as trial-preparation records.

Writ denied.

O'CONNOR, C.J., and LUNDBERG STRATTON, O'DONNELL, LANZINGER, CUPP, and McGEE BROWN, JJ., concur.

PFEIFER, J., concurs in judgment only.

All Citations

131 Ohio St.3d 10, 959 N.E.2d 524, 275 Ed. Law Rep. 387, 2011 -Ohio- 6009

End of Document